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The Right to Terminate for Default

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Synopsis

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by
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The acquisition of supplies and services for the federal government is governed by a multitude of statutes and regulations. It is not uncommon for contractors to experience difficulties in performance of the contract. When the government loses confidence that the contractor will successfully complete the contract, the contract may be terminated. This thesis discusses the substantive bases for the default termination of government contracts. It addresses defaults for failure to deliver, failure to make progress, and failure to fulfill other terms of the contract.

The Right to Terminate for Default

By

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CHAPTER I

INTRODUCTION

Men must turn square corners when they deal with the Government."
Oliver Wendell Holmes, Jr.[1]

It is no less good morals and good law that the Government should turn square corners in dealing with the people."
Hugo Black[2]

This paper outlines the various circumstances that trigger the government's right to impose the drastic sanction of termination for default. The stakes for the contractor are high, with its continued viability often depending on completion of the contract. The quotes above aptly characterize the competing concerns in the termination of government contracts. For example, the government's right to strict compliance with its specifications is counter-balanced by the notion that the contractor should not bear the risk of forfeiture when minor deviations from specifications are present. The balance struck by the courts and boards illustrates that strict compliance has been tempered by common sense and equity. Occasionally, however, an agency that has strictly administered a contract will be upheld when it has terminated a contract for seemingly minor deviations.

Default termination parallels the common law right to

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[1]Rock Island A. & L.R.R. v. United States, 254 U.S. 141, 143 (1920).

[2]St. Regis Paper Co. v. United States, 368 U.S. 208, 229 (1961) (dissenting opinion).

terminate a contract for material breaches. It is the government's last resort and signals that the needed supplies, services, or construction will not be procured from that contractor. However, the contractor is not without recourse. If it is able to demonstrate that the default termination was improperly initiated, then it will have the benefits of a convenience termination. The FAR provides separate default clauses for supply/service and construction. The Supply and Services clause provides:

> (a) (1) The Government may, subject to paragraphs (c) and (d) below, by written notice of default to the Contractor, terminate this contract in whole or in part if the Contractor fails to --
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> (i) Deliver the supplies or to perform the services within the time specified in this contract or any extension;
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> (ii) Make progress, so as to endanger performance of this contract (but see subparagraph (a)(2) below); or
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> (iii) Perform any of the other provisions of this contract (but see subparagraph (a)(2) below).
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> (2) The Government's right to terminate this contract under subdivisions (1)(ii) and (1)(iii) above, may be exercised if the Contractor does not cure such failure within 10 days (or more if authorized in writing by the Contracting Officer) after receipt of the notice from the Contracting Officer specifying the failure.
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> (b) If the Government terminates this contract in whole or in part, it may acquire, under the terms and in the manner the Contracting Officer considers appropriate, supplies or services similar to those terminated, and the Contractor will be liable to the Government for any excess costs for those supplies or services. However, the Contractor shall continue the work not terminated.
>
> (c) Except for defaults of subcontractors at any

tier, the Contractor shall not be liable for any excess costs if the failure to perform the contract arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include (1) acts of God or of the public enemy, (2) acts of the Government in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance the failure to perform must be beyond the control and without the fault or negligence of the Contractor.

(d) If the failure to perform is caused by the default of a subcontractor at any tier, and if the cause of the default is beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either, the Contractor shall not be liable for any excess costs for failure to perform, unless the subcontracted supplies or services were obtainable from other sources in sufficient time for the Contractor to meet the required delivery schedule.

(e) If this contract is terminated for default, the Government may require the Contractor to transfer title and deliver to the Government, as directed by the Contracting Officer, any (1) completed supplies, and (2) partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (collectively referred to as "manufacturing materials" in this clause) that the Contractor has specifically produced or acquired for the terminated portion of this contract. Upon direction of the Contracting Officer, the Contractor shall also protect and preserve property in its possession in which the Government has an interest.

(f) The Government shall pay contract price for completed supplies delivered and accepted. The Contractor and Contracting Officer shall agree on the amount of payment for manufacturing materials delivered and accepted and for the protection and preservation of the property. Failure to agree will be a dispute under the Disputes clause. The Government may withhold from these amounts any sum the Contracting Officer determines to be necessary to protect the Government against loss because of outstanding liens or claims of former lien holders.

(g) If, after termination, it is determined that the Contractor was not in default, or that the default

was excusable, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of the Government.

(h) The rights and remedies of the Government in this clause are in addition to any other rights and remedies provided by law or under this contract.[3]

The Construction clause provides:

(a) If the Contractor refuses or fails to prosecute the work or any separable part, with the diligence that will insure its completion within the time specified in this contract including any extension, or fails to complete the work within this time, the Government may, by written notice to the Contractor, terminate the right to proceed with the work (or the separable part of the work) that has been delayed. In this event, the Government may take over the work and complete it by contract or otherwise, and may take possession of and use any materials, appliances, and plant on the work site necessary for completing the work. The Contractor and its sureties shall be liable for any damage to the Government resulting from the Contractor's refusal or failure to complete the work within the specified time, whether or not the Contractor's right to proceed with the work is terminated. This liability includes any increased costs incurred by the Government in completing the work.

(b) The Contractor's right to proceed shall not be terminated nor the Contractor charged with damages under this clause, if --

(1) The delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include (i) acts of God or of the public enemy, (ii) acts of the Government in either its sovereign or contractual capacity, (iii) acts of another Contractor in the performance of a contract with the Government, (iv) fires, (v) floods, (vi) epidemics, (vii) quarantine restrictions, (viii) strikes, (ix) freight embargoes, (x) unusually severe weather, or (xi) delays of subcontractors or suppliers at any tier arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and the subcontractors or

[3]FAR § 52.249-8.

suppliers; and

(2) The Contractor, within 10 days from the beginning of any delay (unless extended by the Contracting Officer), notifies the Contracting Officer in writing of the causes of delay. The Contracting Officer shall ascertain the facts and the extent of delay. If, in the judgment of the Contracting Officer, the findings of fact warrant such action, the time for completing the work shall be extended. The findings of the Contracting Officer shall be final and conclusive on the parties, but subject to appeal under the Disputes clause.

(c) If, after termination of the Contractor's right to proceed, it is determined that the Contractor was not in default, or that the delay was excusable, the rights and obligations of the parties will be the same as if the termination had been issued for the convenience of the Government.

(d) The rights and remedies of the Government in this clause are in addition to any other rights and remedies provided by law or under this contract.[4]

This study of the government's right to terminate for default follows the organization of the Supply/Service clause. Paragraph (a)(1)(i)[5] outlines the government's right to terminate for failure to deliver; (a)(1)(ii) describes the right to terminate for failure to make progress; and (a)(1)(iii) provides the right to terminate for failure to comply with other provisions. The Construction clause covers the same essential bases for termination although it does not contain an "other provisions" clause.

Discussion of delivery failures in Chapter Two considers

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[4]FAR 52.249-10.

[5]In older cases, this paragraph is referred to as paragraph (a)(i), its former nomenclature. The current cases commonly cite the clause as (a)(i) even when referring to (a)(1)(i). The same comment holds true for paragraphs (a)(1)(ii) and (a)(1)(iii).

issues of 1) whether time is of the essence, and 2) whether timely delivery of goods with minor defects may be rejected. The boards and courts appear willing to enforce default terminations for delivery failures where the government has properly administered the contract, regardless of the consequences on the contractor. Thus, time is of the essence in government contracts and a breaching supply contractor risks forfeiture for slight delays in performance. The harshness of strict compliance has been tempered by the doctrine of substantial compliance, which provides the contractor with extra time to correct minor defects.

Chapter Three explores whether an incomplete, but substantially completed construction project, will entitle the contractor to the contract price less deductions for uncompleted or deficient work. The rationale underlying the doctrine of substantial completion appears to be widely misunderstood by the boards. The cases misleadingly discuss forfeiture, when the focus should be on the true purpose of substantial completion: whether the contractor has performed substantially enough to benefit from the contract price. In service contracts, the substantiality of performance is determined by evaluation of the number and nature of defects. When the services are critical, however, a single breach may sustain termination.

Progress failures, covered in Chapter Four, raise the issue of how far the contractor must be behind schedule to permit termination. The cases reveal that timely completion need not

be impossible; however, the government must show a reasonable likelihood that timely completion is threatened.

Chapter Five explores the contractor's duty to proceed with contract performance in accordance with the Disputes Clause and discusses three exceptions: a) government material breach of contract, b) impracticability of proceeding, and c) lack of clear direction. Special attention is given to the materiality of government failure to make timely progress payments.

Chapter Six concludes with a discussion of termination rights for breach of other provisions of the contract. The chapter addresses terminations under the "other provisions" clause as well as terminations under other contract provisions providing independent termination rights, such as the labor standards or inspection clauses.

Default terminations may be broadly divided into delivery failures, progress failures, and other failures. Delivery failures leave the contractor with little room to maneuver, in light of the strict enforcement of timely delivery requirements. Progress failures are less susceptible of precise determination; therefore, the government must be extremely careful in marshalling the facts that show why timely completion is endangered. Analysis of the propriety of termination for breaches of other provisions disclose no formula for application. Rather the controversies are fact-specific, resolved with a reference to common law notions of equity and fairness. This paper attempts to provide the reader with a

general framework to understand and resolve termination issues.

CHAPTER II

DELIVERY FAILURES:

THE RIGHT TO TERMINATE AFTER THE PERFORMANCE DATE HAS PASSED

A. Introduction

"Time is of the essence in any contract containing fixed dates for performance."[6] This maxim, announced in dicta, in *DeVito v. United States*,[7] is the starting point in any discussion of the government's right to terminate for slight delays in performance. A review of the cases reveals that the principle is liberally quoted and enjoys continued application in cases of untimely performance, notwithstanding occasional criticism in dicta.

The standard default clauses literally require timely performance on pain of default.[8] As a practical matter, the

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[6]DeVito v. United States, 413 F.2d 1147, 1154, 188 Ct. Cl. 979, 991 (1969).

[7]*Id.*

[8]FAR 52.249-8 and FAR 52.249-10. FAR 52.249-8(a)(1)(i) provides in pertinent part:

> (a) (1) The Government may...terminate this contract in whole or in part if the Contractor fails to --
>
> (i) Deliver the supplies or to perform the services within the time specified in this contract or any extension.

FAR 52.249-10(a) provides in pertinent part:

government will not normally terminate a contract for slight delays because such a termination generally produces greater delay in obtaining the ultimate objective;[9] nevertheless, termination may be desirable when the item or service is no longer needed or has dropped in price.[10] The *DeVito* quote has been cited in countless cases; however, it has not always been strictly enforced. Default termination has been labeled "a species of forfeiture;"[11] thus, the boards and courts sometimes limit termination when the government has either benefitted from contract performance[12] or caused the contractor to believe that time was not of the essence.[13] Furthermore, the doctrine of substantial compliance, expounded in *Radiation Technology Inc.*

(a) If the Contractor...fails to complete the work within [the contract specified] time, the Government may, by written notice to the Contractor, terminate the right to proceed with the work (or the separable part of the work) that has been delayed.

[9]*See* DeVito v. United States, 413 F.2d at 1153; 188 Ct. Cl. at 991.

[10]*See* Artisan Elec. Corp. v. United States, 499 F.2d 606, 205 Ct. Cl. 126 (1974) (decreased need for radio filters without impact on government right to terminate for default); Thomas C. Wilson, ASBCA No. 26035, 83-1 BCA ¶ 16,149 (proper termination for default; although government no longer needed repair plugs, time was still of the essence).

[11]J.D. Hedin Constr. v. United States, 408 F.2d 424, 431, 187 Ct Cl. 45, 57 (1969); *see* Ite, Inc., NASA BCA 1086-6, 88-1 BCA ¶ 20269 ("[w]e are reminded that default is a drastic sanction and should be sustained only for good grounds and on solid evidence").

[12]*Cf.* Cosmos Eng'rs, Inc., ASBCA No. 19780, 77-2 BCA ¶ 12,713 (applying substantial performance principle to supply contract that included installation of audio-visual equipment, and where only minor adjustments needed within one day after due date).

[13]*See* section B(2) below.

v. United States,[14] affords the contractor additional time to cure minor defects. The waiver doctrine also limits the government's right to terminate for default.[15] This chapter examines when the government may exercise its right to terminate for default after the contract due date has passed and discusses how the contractor may be excused from strictly complying with the time for performance.

B. When is Time of the Essence?

Of the relatively few cases that have discussed whether time is of the essence, most involve controversies over whether the government has waived its right to terminate a contract by virtue of its post-completion date conduct. In *DeVito*, the court's broad and conclusory statement that "[t]ime is of the essence in any contract containing fixed dates for performance," belied its ultimate holding that the government had forfeited its right to terminate for default.[16] The Court of Claims ruled that a 48 day delay in terminating for default after failure to make an interim delivery was unreasonable and created the inference that time was not of the essence. Thus, the case

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[14]366 F.2d 1003, 177 Ct. Cl. 227 (1966).

[15]DeVito v. United States, 413 F.2d 1147, 188 Ct. Cl. 979 (1969) (seminal case discussing waiver). Although waiver will be discussed *infra*, a comprehensive analysis is beyond the scope of this paper.

[16]*Id.* at 1154, 188 Ct. Cl. at 991.

focused on post completion date government conduct demonstrating that time was not of the essence.[17] This section, however, focuses on contract administration up through the due date.

The oft-cited *DeVito* dicta has been the foundation of numerous cases upholding termination for default for untimely performance.[18] However, in *Franklin E. Penny v. United States*,[19] the Court of Claims, again in *dicta*, stated: "[S]ave in situations where 'time is of the essence,' the timeliness of a contractor's performance is as much a factor to be considered in evaluating the substantiality of that performance as are all other factors which might bear upon the adequacy of completeness of that performance."[20] This statement is an accurate description of the common law[21] and is frequently argued (unsuccessfully) by defaulted contractors.[22] The essence of the argument is that a contract is substantially performed when

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[17]*Id. See* Indemnity Ins. Co. of North America v. United States, 14 Cl. Ct. 219, 225 (1988) ("the actions and/or inactions of the parties between the original completion date and the termination date must be considered to determine if they present circumstances and facts requiring the application of the *DeVito* rule").

[18]*See* note 61 *infra*.

[19]524 F.2d 668, 207 Ct. Cl. 842 (1975).

[20]*Id.* at 676, 207 Ct. Cl. at 856-57.

[21]*See generally* RESTATEMENT (SECOND) OF CONTRACTS § 242 and comments a, b, c, and d (1981); J. CALAMARI AND J. PERILLO, THE LAW OF CONTRACTS, § 11-18(a) (3d ed. 1987).

[22]*See e.g.*, Kit Pack Co., ASBCA No. 33135, 89-3 BCA ¶ 22,151. Noting that the appellant cited *Franklin Penny* without mentioning *DeVito*, the board upheld the termination, citing *DeVito* with approval. The contractor had argued both that the government had waived the default and that time was no longer of the essence when it failed to timely deliver first articles.

tender of conforming goods is made with only slight delay; hence, the substantial compliance doctrine may be applied. Although *Franklin Penny* has been cited with approval in several cases, it has not resulted in the overturning of a default termination and is of doubtful utility in government contracts.[23]

For example, the ASBCA embraced the *Franklin Penny* dicta in *West Coast Research Corporation*, [24] where it considered a two day late delivery that "remained unopened for 16 or 17 days."[25] The board found that time was not of the essence; however, it upheld the termination because the goods were defective. The board suggested that "[w]ere time of delivery the only issue insofar as substantial compliance is concerned we would be inclined to say that delivery was timely...."[26] In *R & O Indus., Inc.*,[27] the GSBCA reviewed *Franklin Penny* and *West Coast Research*, concluding that an untimely delivery would not

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[23]*See* Am. Business Sys., GSBCA Nos. 5140, 5141, 80-2 BCA ¶ 14,461 (citing *Franklin Penny* with approval in analysis of deficient performance not including late tender); R & O Indus., Inc., GSBCA No. 4800, 80-1 BCA ¶ 14,195 (citing *Franklin Penny* with approval; discussed *infra* at note 27 and accompanying text); West Coast Research Corp., ASBCA No. 21087, 77-1 BCA ¶ 12,510 (citing *Franklin Penny* with approval; discussed *infra* at note 24 and accompanying text); *but see* Nat'l Farm Equip. Co., GSBCA No. 4921, 78-1 BCA ¶ 13,195 (rejecting application of *Franklin Penny* when no tender made, despite fact that goods could have been ready in 48 hours).

[24]ASBCA No. 21087, 77-1 BCA ¶ 12,510 (contract for wind tunnel balance).

[25]*Id.* at 60,644.

[26]*Id.*

[27]GSBCA No. 4800, 80-1 BCA ¶ 14,195.

necessarily trigger the government's right to terminate. The termination, however, was upheld because the tender was excessively late.[28] Nonetheless, the board pointedly recognized the "validity of the doctrine of substantial performance" in a context of tender of goods shortly after the due date.[29] The *R & O Indus.* case represents the apparent zenith of *Franklin Penny*.[30] Conversely, the next subsection illustrates the continuing vitality of the *DeVito* view.

(1) When May the Government Terminate for Slight Delays in Performance?

At common law, neither buyer nor seller had a right to recover under the contract "without tender on the exact day named in the contract."[31] That rule has been softened by equity to permit the defaulting party to continue unless timely

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[28] *Id.*

[29] *Id.* at 69,877. Judge Coldren concurred in the opinion, withholding his approval of this proposition.

[30] *See* Mills Typewriter Serv., GSBCA No. 5227, 80-1 BCA ¶ 14,347 n.1 (noting that *Franklin Penny* analysis should be narrowly interpreted); *but see* Precision Mfg. of San Antonio, ASBCA No. 32630, 87-1 BCA ¶ 19,145 (suggesting that late delivery might permit application of substantial performance doctrine; however, termination for default upheld on dual bases that delivery was six days late and that "the defective untimely tender was not cured in a reasonable period of time").

[31] 2 S. WILLISTON, SALES § 453a (1948).

performance is essential to the bargain.[32] The courts and boards have not similarly ameliorated the sometimes harsh impact of the government's exercise of its right to terminate immediately after the due date, regardless of the contractor's degree of completion of performance. Supply contracts are considered first, followed by construction and services.

(a) Supply Contracts

The government's right to terminate for failure to timely deliver is quite expansive. For example, in *Switlik Parachute Co. v. United States*,[33] the court considered the default termination of a contract for delivery of survival vests with an increment due on May 10, 1973.[34] By the 3rd of May, the vests for the first increment had been 85-90% completed; however, believing that the specification resulted in an inoperative holster strap on the vest, Switlik suspended production and notified the administrative contract officer of the problem on that day.[35] Completion of the remaining 10-15% of the increment

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[32]3 A. CORBIN, CONTRACTS § 713 (1950); RESTATEMENT (SECOND) OF CONTRACTS §241 (1981); *see* Nuclear Research Assocs., Inc. ASBCA No. 13563, 70-1 BCA ¶ 8237 (Shedd, J., dissenting).

[33]573 F.2d 1228, 216 Ct. Cl. 362 (1978).

[34]*Id.* at 1231, 216 Ct. Cl. at 365.

[35]*Id.*, 216 Ct. Cl. at 366-67.

would have taken approximately two to three days.[36] The government informed Switlik on May 7th that the delivery schedule had not been waived.[37] The CO terminated the contract for default on May 10, 1973 after the plaintiff failed to make delivery.[38] The Court of Claims resolved the controversy over the specifications in favor of the government and ruled that even if the specifications were defective, the contractor discharged its duty not to knowingly manufacture defective products by notifying the government of the problem.[39] Ruling that the delay was not excusable, the court upheld the default termination. Judge Nichols, in dissent, stressed that the contract was nearly completed and noted that the government never reprocured.[40] Thus, he argued that the default termination was "simply a case of using a technical default to eliminate paying for a product no longer needed."[41] The Court of Claims' rejection of that argument demonstrates that the

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[36]*Id.*, 216 Ct. Cl. at 366.

[37]*Id.*, 216 Ct. Cl. at 367. The quality assurance specialist (QAS) who was sent to Switlik's plant found the difficulty was due at least in part to Switlik's incorrect stitching. The QAS consulted with his supervisor and they agreed that the specifications were adequate. The procurement contract officer claimed that he notified Switlik of the adequacy of the specifications on May 8, 1973. Switlik denied receiving this call. The court's holding did not require resolution of this controversy.

[38]*Id.* at 1232, 216 Ct. Cl. at 368.

[39]*Id.* at 1235, 216 Ct. Cl. at 374.

[40]*Id.* at 1237, 216 Ct. Cl. at 377.

[41]*Id.* at 1237, 216 Ct. Cl. at 377.

government's right to enforce timely delivery is exceedingly difficult to overcome.[42]

In a more recent case, *Boston Shipyard Corp. v. United States*,[43] the contractor failed to deliver a tugboat under a fixed price supply contract and was terminated for default two days after the required delivery date. The tug was between 70% and 80% complete at termination. The $2,055,925 fixed price supply contract calling for design and construction of a tugboat was awarded on August 29, 1983 for completion by August 4 1984.[44] Boston Shipyard Corporation (BSC) fell a month behind schedule by the end of November 1983.[45] After BSC unsuccessfully attempted to move the tug to a drydock for completion of construction on June 27, 1984, it essentially ceased work on the tugboat.[46] At a July 17, 1984 meeting to determine whether timely delivery was possible, BSC alleged the tugboat's design was defective.[47] Although the CO agreed to obtain a design review, he insisted the design was sound and stressed that the delivery date was not waived. The subsequent

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[42]*See* Mills Typewriter Serv., GSBCA No. 5227, 80-1 BCA ¶ 14,347 n.1 (Commenting that *Switlik* requires narrow interpretation of *Franklin Penny*).

[43]10 Cl. Ct. 151 (1986).

[44]*Id.* at 152-53.

[45]*Id.* at 153.

[46]*Id.* at 154.

[47]*Id.* at 158.

review concluded that the design was not defective.[48]

BSC argued that the government had waived the delivery date.[49] The Claims Court rejected application of the *DeVito* "doctrine of waiver after default" because the termination was made on the first working day after the default.[50] Judge Harkins ruled that the CO's agreement to obtain a design review coupled with making an early progress payment did not constitute waiver of the delivery date nor create an "inference that time [was] no longer of the essence."[51] The court concluded that BSC had stopped work long before the meeting; thus, it had not acted in reliance upon its belief that time was not of the essence. The court denied BSC's claim for conversion to a convenience termination and awarded the government over $750,000 for unliquidated progress payments.[52]

Boston Shipyard illustrates the general rule that time is of the essence in government contracts, and will be enforced despite the sometimes harsh impact on the contractor.[53] The government preserved its rights by administering the contract in

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[48]*Id.* at 154.

[49]*Id.* at 158.

[50]*Id.* at 160.

[51]*Id.*

[52]*Id.* at 170.

[53]The government in *Boston Shipyard* attempted to have the tugboat completed by another dock yard, but abandoned that effort and issued a new solicitation for complete construction of a new vessel. *Id.* at 172.

a manner clearly preserving the essence of time. For example, the CO notified BSC of his concern with the lack of progress on December 8, 1983, met with BSC's president on January 31, 1984, and sent a cure notice on April 18, 1984.[54] In response, BSC provided revised schedules to demonstrate how completion would be timely. Thus, BSC had no argument that the government did not consider time of the essence.

Boston Shipyard presented a difficult case. However, the more perplexing issue is presented when the government does not need the item until after the contractor's completion date. Although no cases are directly on point, resolution of whether a termination for default should be sustained under those circumstances may be aided by reference to substantial completion analysis.[55] When a contract is substantially complete, the contractor preserves its right to the contract price, less deductions for government injury for the unperformed or defective work. A by-product of substantial completion is the contractor's avoidance of a forfeiture for work completed. In a supply case, unlike a construction or service contract, the contractor's risk of forfeiture is much greater, because the government bears no liability for work performed when no deliveries are made. The risk is accentuated when the items are specially manufactured. Thus, holding the contractor to the

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[54]*Id.* at 164-65.

[55]Substantial completion is discussed in greater depth in the next chapter.

strict terms of contract delivery dates may result in a forfeiture. Accordingly, to ask whether the contract should be terminated for default is analogous to asking whether it has been substantially completed, with time, rather than performance, as the critical variable. Although the boards and courts have not used such an analogy, this analysis would allow flexibility, with the essence of time varying with the government's need for the product. Unless the government's purpose will be frustrated, the contractor will have attained substantial completion, provided that delivery can indeed be made to satisfy the government's actual requirement. The burden should be on the contractor to prove substantial completion; therefore, borderline cases should favor the government, which is innocent of contract deviations.

When the government has a bona fide reason for enforcing the time terms, such as urgent need or changed circumstances, then the equities do not favor forcing the non-breaching party to accept the supplies. However, when the government's needs will be satisfied by the contractor's untimely performance, the equities may swing from the government to the contractor, who would otherwise suffer a forfeiture. A difficult question is whether a drop in price of the item is a bona fide government reason for exercising its right to terminate. This is the most likely reason that the government might terminate a contract when it still wants the item, but does not need it until the contractor can deliver it. A termination strictly to obtain a

lower price has been criticized in *Torncello v. United States*;[56] however, the contractor there, was not otherwise in default of the contract. The contract puts the risk of untimely delivery on the contractor.[57] Furthermore, a successful substantial completion argument retains the contract price as the measure of performance, but still provides the government allowance for the damage sustained by the unperformed or defective work. To allow the contractor to proceed to completion varies from substantial completion, because under that doctrine, the government is not forced to allow extra time to perfect performance. Contrast substantial compliance, discussed in the following section, which affords the contractor extra time to cure minor defects. To allow the contractor extra time to deliver the item with an adjustment in price is a hybrid of the two doctrines.

In considering situations where the contractor has failed to make timely delivery, the boards have rejected application of the substantial completion doctrine.[58] For example, the ASBCA

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[56]681 F.2d 756, 231 Ct. Cl. 20 (1982).

[57]Another competing concern is the integrity of the bidding process. Permitting a contractor to perform for a longer time period may be inequitable to a disappointed bidder who might have been able to offer a lower price for a longer performance period. At the very least the contracting officer may not relax the contract requirements without some consideration.

[58]*See* Thomas C. Wilson, Inc., ASBCA No. 26035, 83-1 BCA ¶ 16,149 at 80,285 ("[t]he substantial performance doctrine has never been applied where no deliveries have been tendered by the contract"); Nat'l Farm Equip. Co., GSBCA No. 4921, 78-1 BCA ¶ 13,195 at 64,539 ("[w]e are not aware of any precedents holding that there has been substantial performance when there has been no tender of shipment or delivery and the contract includes a delivery date which has not been waived by the Government").

explored the outer boundaries of the government's right to terminate for default because of slight delays in *Nuclear Research Associates, Inc.*[59] There, a fixed price contract for a special recording instrument mandated delivery on Friday, July 12, 1968. Nuclear Research failed to make delivery on that date; however, it delivered the item on Monday morning, July 15 1968, approximately 30 minutes before the termination contract officer sent notice of termination, and approximately two hours before it received notice of the termination. The Senior Deciding Group of the ASBCA ruled that "once an appellant has failed to deliver on time, the government, absent excusable cause of delay has an indefeasible right to terminate the contract, unless its own conduct deprives it of that right."[60] Untimely delivery prior to default termination was no bar to terminating the contract for default. The boards have continued to rule that time is of the essence in government contracts.[61]

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[59]ASBCA No. 13563, 70-1 BCA ¶ 8237.

[60]*Id.* at 38,284. *See* Chemithon Corp. v. United States, 1 Cl Ct 747 (1983) ("the majority view permits termination any time after the due date for delivery even though the contractor is permitted to show excusability after the due date") (holding termination proper despite contractor's apparent cure within 10 days of due date).

[61]Kit Pack Co., ASBCA No. 33135, 89-3 BCA ¶ 22151, (ruling failure to timely deliver first article gave government right to terminate for default when contract contained first article default clause); Price Supply Co., ASBCA No. 34043, 87-3 BCA ¶ 20,134, (upholding default termination issued on October 8, 1986 when contractor failed to deliver pipe supplies by contract delivery date of October 2, 1986); Standard Blackboard and School Supply Co., GSBCA Nos. 7403, 7255, 86-1 BCA ¶ 18,712, (upholding termination for default on June 20, 1983 when the contractor failed to deliver blackboards by June 13, 1983 as required by bilateral agreement); Birken Manufacturing Co., ASBCA No. 30188, 85-2 BCA ¶ 18,154, (upholding default termination for failure to

Slavish enforcement of delivery dates may lead to economic waste. Permitting a contractor to complete a contract when the government's requirements are not prejudiced is economically prudent. The government, however, should be allowed to benefit from a decrease in price (if applicable), because the contractor is in default. The government's allowance should approximate the savings to the contractor for the extended time of performance. As a practical matter, contracting officers may, in fact, be following this course in extracting consideration for extension of delivery dates. This may account for the absence of cases discussing the problem.

(b) Construction Contracts

The strict enforcement of time provisions in construction contracts does not engender the fierce controversies prevalent in supply contracts because the construction contractor is entitled to payment for work accomplished and does not bear the

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timely deliver first articles, when the contract contained a clause making such failure grounds for default termination); Yankee Telecommunication Laboratories, Inc., ASBCA No. 26308, 85-1 BCA ¶ 17,786 (government would have been justified in terminating when contractor missed delivery date); Romark Indus., Inc., ASBCA No. 26339, 84-3 BCA ¶ 17667 (failure to deliver breech bolt assemblies); Wilmot Fleming Eng'r Co., ASBCA No. 23240, 79-2 BCA ¶ 14042 at 69,022 ("absent excusable cause of delay, the Government had an indefeasible right to terminate" when contractor failed to deliver first article pipe cut-off machines); Nat'l Farm Equip. Co., GSBCA No. 4921, 78-1 BCA ¶ 13,195 (upholding termination for default when the garden implements could have been delivered within 48 hours of contractually specified time).

risk of total forfeiture for slight delays in performance.[62] Thus, whether time is of the essence in construction contracts, has not been addressed in the cases. The issue instead has focused not on time, but whether the contract has been substantially completed. Therefore, time is not of the essence in construction contracts.[63]

(c) Service Contracts

In service contracts, time is of the essence when the performance failure consists of major deficiencies. In *Greenleaf Distribution Serv., Inc.*,[64] a contract to provide stevedoring services at the largest military terminal on the West Coast was properly terminated for default on the day after the services were required. The contractor had failed to obtain

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[62]*See* Corway Inc. ASBCA No. 20683, 77-1 BCA ¶ 12,357 (*DeVito* doctrine seldom applicable to construction contracts because in administration of most such contracts, "delinquent contractors are permitted to proceed subject to liquidated damages;" hence, no waiver); Olson Plumbing and Heating Co., ASBCA Nos. 17965, 18411, 75-1 BCA ¶ 11,203 at 53,336 (the reason *DeVito* principle normally is inapplicable to construction contracts is the "construction contract provides for payment or credit for partially completed work and materials delivered to the site;" thus, "work performed after the due date is not normally wasted"); *cf.* Monaco Enterprises, Inc., ASBCA Nos. 27142, 27423, 86-2 BCA ¶ 18,922 (citing *Olson* with approval).

[63]Substantial completion of construction contracts is discussed in the next chapter. The cases reveal that the government is always allowed to terminate the executory portion of the contract; therefore, time is of the essence only to the extent that if a contractor misses a contract deadline, it may suffer a partial termination.

[64]ASBCA No. 34300, 88-3 BCA ¶ 21,011.

insurance; thus, it was unable to perform. Noting that service contracts, unlike supply contracts, do not have readily apparent delivery dates, the ASBCA, nonetheless, ruled that "given the nature of these services, there can be no doubt that time was of the essence...."[65] The board concluded that the "failure to provide daily terminal services was a failure to perform within the time specified by the contract."[66] In *Building Maintenance Specialists, Inc.*,[67] the ASBCA stated:

> The general rule with respect to services is that a failure to perform services that are required to be performed daily is not curable by performance on a later date. It is equivalent to a failure to deliver supplies on time and will support a termination for default under paragraph (a)(i) without prior notice. (citations omitted).[68]

Thus, termination two days after the contractor failed to provide lifeguard services was upheld. The contractor was paid the fair market value of the services performed; therefore, the specter of forfeiture is tempered by the contractor's right to remuneration for work accomplished.[69] In *Western Refuse*

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[65]*Id.* at 106,100.

[66]*Id* at 106,101; *accord*, Atterton Painting & Constr., Inc., ASBCA No. 31471, 88-1 BCA ¶ 20,478 at 103,585 (termination for default of requirements contract for painting proper; "[o]nce completion dates for the work under these delivery orders had passed without completion immediate default action was legally permissible"); Carolina Maintenance Co., ASBCA No. 25891, 87-1 BCA ¶ 19,571(housing maintenance requirements contract properly terminated for default for failure to complete work orders on time).

[67]ASBCA No. 25552, 85-3 BCA ¶ 18,300.

[68]*Id.* at 91,826.

[69]*Id.* *See* Carolina Maintenance Co., ASBCA No. 24891, 87-1 BCA ¶ 19,571 (government paid contractor for work performed).

Hauling, Inc.,[70] the VABCA similarly ruled that time was of the essence in a contract for trash removal. The board upheld the October 12th termination for default when the contractor failed to perform after October 2nd.[71]

When the performance failures are minor, then the government's right to terminate for default is limited by the doctrine of substantial completion. Periodic due dates in the typical service contract create analytical problems because a service not completed one day may not be completed twice the next. Therefore, the government's bargain is impaired by minor deficiencies,[72] but it may terminate the entire contract only if the contractor has not substantially performed. Thus, the question regarding minor defects is not whether time is of the essence, but whether the contractor has substantially performed the contract.

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[70]VABCA No. 1411, 80-1 BCA ¶ 14,360.

[71]*Id.* *See* Riteway Sanitation Serv., ASBCA No. 14304, 70-2 BCA ¶ 8553 at 39,767 ("[t]ime was obviously of the essence of Appellant's obligation. Accordingly, when Appellant failed to perform the [refuse collection], it was in material breach") (cited with approval in *Western Refuse*); Mills Typewriter Serv., GSBCA No. 5227, 80-1 BCA ¶ 14,437 (recognizing that prompt typewriter service was the essence of the contract; termination for default overturned on other grounds).

[72]The contract will often provide for deductions for deficiencies. *See* discussion in subsection B(2)(d) of the next chapter.

(2) When Does Government Conduct Indicate Time is Not of the Essence?

Government conduct during performance may show that time is not of the essence; therefore, the contractor's failure to meet the contract completion date will not trigger the right to terminate for default. For example, in *Jack Spires & Sons Electrical Co.*,[73] the Corps of Engineers Board of Contract Appeals (ENGBCA) held that "[t]he government can waive or relax a performance schedule either expressly or by inaction."[74] The board ruled that the government's failure to respond to a letter and its tardy testing of the rehabilitated motor, taking six weeks instead of four, indicated that time was not of the essence. The board held, therefore, that the original performance schedule had been waived.

In *Amecon Division, Litton Sys., Inc.*,[75] the ASBCA held that "the Navy's conduct manifested a constructive election to waive the delivery due by 19 June 1974." The contract covered the procurement of tactical early warning systems. When it became apparent in early June that the contractor would not meet the 19 June due date, the Navy held a meeting with the contractor in an effort to plan how to satisfy subsequent due dates. The Navy informed the contractor that it had rejected a

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[73]ENG BCA No. 5143, 87-3 BCA ¶ 20,069.

[74]*Id.* at 101,626.

[75]ASBCA No. 19687, 77-1 BCA ¶ 12,329.

recommendation to terminate the contract and advised the contractor to continue performance, knowing that the delivery date was unattainable. Somewhat contradictorily, the board stated that the government could have properly terminated for default immediately after the delivery date was missed. However, the Navy delayed until 8 August to terminate; therefore, the board held that the Navy's conduct before and after the delivery date manifested an intent not to terminate for failure to deliver on time. On reconsideration, the board apparently retreated from its language characterizing the government's pre-due date conduct as having waived the delivery date.[76] Contrary to its original discussion indicating that the Navy's contract administration had led the contractor to believe that time was no longer of the essence, the board ruled that the government did not lose its right to terminate until after the due date passed.

The ASBCA has since held that the government may lose its right to terminate for default based upon pre-delivery date conduct.[77] In *Pacific Coast Welding & Machine, Inc.*,[78] the

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[76]Amecon Division, Litton Sys., Inc., ASBCA No. 19687, 77-2 BCA ¶ 12554.

[77]*See* Gary Aircraft Corp., ASBCA No. 20534, 85-3 BCA ¶ 18,498 at 92,902 (government's "administration of the contract was such as to lead a reasonable contractor to believe that time was not of the essence"); Baifield Indus., Division of A-T-O, Inc., ASBCA Nos. 14582, 14583, 72-2 BCA ¶ 9276 at 45,184 (government's course of conduct "manifested to appellant a Government lack of concern with the August delivery schedule, and that compliance with the 31 August delivery date for 156 [cargo containers] was not of the essence"); *cf.* Composites Horizons, ASBCA Nos. 25529, 26471, 85-2 BCA ¶ 18,059 (government's contractual modification of delivery dates after original dates had passed, combined with encouragement to continue

Center for Disease Control awarded the contractor a fixed price contract for delivery of one stainless steel tank. The contractor missed several delivery dates for approval of shop drawings because of disagreement over the interpretation of the specifications. Despite the CO's position that the contractor's difficulties were not caused by the government, the CO twice modified the due date when delivery could not be accomplished. Noting that two prior waivers of the delivery date did not waive the new delivery date, the board focused on whether those waivers affected whether time was of the essence. Although the board cited *DeVito*, it held that the due date was waived, and ruled that the "contract [had] been administered in such a way as to lead a reasonable contractor to believe that time was not of the essence."[79]

This case illustrates the lack of clarity in analyzing government conduct that suspends its right to terminate for default. Although *DeVito* was concerned with post delivery date government conduct evincing a lack of urgency, the waiver doctrine has been applied to pre-delivery date conduct as well. Although the courts and boards have not articulated a separate category of "anticipatory waiver," the analysis is distinct

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constituted waiver of new delivery dates); *compare* Acudata Systems, Inc., DOTCAB Nos. 1198, 1233, 84-1 BCA ¶ 17,046 (under circumstances, waiver of preproduction schedule constituted waiver of production delivery schedule).

[78]ASBCA No. 26105, 83-1 BCA ¶ 16,398.

[79]*Id.* at 81,538.

because the government may lose its right to terminate for untimely delivery before the completion date passes. As a practical matter, however, the prudent government contractor should not risk termination for default by late performance just because the government has been less than vigilant in its contract administration.

C. The Doctrine of Substantial Compliance

"The Government is entitled to strict compliance with its contract requirements."[80] This section examines a judicially created, prophylactic rule that entitles a contractor to extra time for performance despite less than strict compliance.[81] Thus, the harsh consequences of a termination for default for failure to timely deliver or perform has been ameliorated by the doctrine of substantial compliance as articulated in the seminal case, *Radiation Technology, Inc. v. United States*.[82] The Court

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[80]Kurz-Kasch, Inc., ASBCA No. 32486, 88-3 BCA ¶ 21,053 at 106,333; *see* Jet Constr, Co. v. United States, 531 F.2d 538, 209 Ct. Cl. 200 (1976); Delphi Indus., Inc., AGBCA No. 76-160-4 A and B, 84-1 BCA ¶ 17,053.

[81]If the required delivery date has not passed, FAR § 46.407(b) requires the government to afford the contractor the "opportunity to correct or replace nonconforming supplies or services when this can be accomplished within the required delivery schedule." The Uniform Commercial Code § 2-508 not only recognizes a similar right to cure but entitles the seller to "further reasonable time to substitute a conforming tender." One commentator argues that the law of government contracts should adopt the principles of the private sector and thus conform to the reasonable expectations of the parties. Venema, ***Substantial Compliance in Fixed Price Supply Contracts***, 17 Pub. Cont. L.J. 1 (1987).

[82]366 F.2d 1003, 177 Ct. Cl. 227 (1966).

of Claims explained that even where time is of the essence, the question remains as to "whether performance was substantial in other respects."[83] The following elements are required: 1) the contractor must make a timely tender; 2) the contractor must have had reasonable grounds to believe that the delivery conformed to contract requirements; 3) the defects must be minor in nature and susceptible to correction within a reasonable time.[84] The contractor bears the burden of proving that its performance substantially complied with contract requirements.[85]

In *Radiation Technology*, the Department of Health, Education and Welfare (HEW) contracted for eight scaler-timer-high voltage systems with ultimate delivery dates of April 12 and 13, 1962.[86] Although the contractor made timely delivery, HEW terminated the contract for default on April 20th, when its inspection revealed the systems failed to meet specifications.[87] Due to the urgent need, the items were reprocured from another contractor within five days.[88] On appeal, the contractor argued that, inasmuch as timely delivery was accomplished, the

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[83]*Id.* at 1006, 177 Ct. Co. at 233.

[84]*Id.* at 1005-06, 177 Ct. Cl. at 232; Gillett Mach. Rebuilders, Inc., ASBCA Nos. 28341, 28958, 89-3 BCA ¶ 22,021.

[85]Gillett Mach. Rebuilders, Inc., ASBCA Nos. 28341, 28958 89-3 BCA ¶ 22,021; Applied Devices Corp., ASBCA No. 23945, 86-3 BCA ¶ 19,089.

[86]Radiation Technology, 366 F.2d at 1004, 177 Ct. Cl. at 228-29.

[87]*Id.* at 1005, 177 Ct. Cl. at 229.

[88]*Id.* at 1004, 177 Ct. Cl. at 229.

government could not terminate for failure to make delivery under (a)(i) of the default clause, but only for failure to make progress under (a)(ii).[89] Thus, the contractor argued that it was entitled to the 10 day cure notice required by the default clause.[90] The government countered that delivery under (a)(i) required tender of conforming goods. The court rejected both theories as extreme, noting the government's position could lead to "a surprise rejection" for technical deviations, while the contractor's view could lead to timely shipments of known defective goods. The court recognized that "substantial compliance with contract specifications" entitled the contractor to a "reasonable period in which to cure a nonconformity."[91]

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[89]The pertinent clauses provided:

> (a) The Government may, *** by written notice of default to the Contractor, terminate the whole or any part of this contract in any one of the following circumstances:
> (i) if the Contractor fails to make delivery of the supplies or to perform the services within the time specified herein or any extension thereof; or
> (ii) if the Contractor fails to perform any of the other provisions of this contract, or so fails to make progress as to endanger performance of this contract in accordance with its terms, and in either of these two circumstances does not cure such failure within a period of 10 days (or such longer period as the Contracting Officer may authorize in writing) after receipt of notice from the Contracting Officer specifying such failure.

Id. at 1004-05, 177 Ct. Cl. at 230.

[90]*Id.* at 1005, 177 Ct. Cl. at 230-231.

[91]*Id.* at 1006, 177 Ct. Cl. at 231-32.

(1) Timely Tender

Radiation Technology did not explicitly hold that a shipment must meet the contract delivery date in order to trigger a substantial compliance analysis; nonetheless, the cases indicate that the doctrine is inapplicable unless the contract due date is met.[92] It is well-settled that the doctrine will not apply when there has been no delivery at all.[93]

(2) Contractor's Belief that Goods Conform

The contractor must have had a reasonable belief that the goods conformed to the contract requirements.[94] The contractor's subjective belief that the goods will perform satisfactorily will not overcome objective evidence

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[92]*See* Section B above.

[93]Precision Mfg. of San Antonio, ASBCA No. 32630, 87-1 BCA ¶ 19,415 at 98,178 ("the doctrine of substantial performance is not applicable because no delivery occurred within the contract performance period") (board apparently meant to say substantial compliance because it cited *Radiation* and discussed reasonable time to cure); *compare* Century Hone Division of Desert Laboratories, Inc., ASBCA No. 18360, 78-1 BCA ¶ 12,990 (no delivery; however, tool made available for timely inspection, so substantial compliance may have been possible); *see* Kipco Machine & Tool, Inc., ASBCA No. 26448, 77-1 BCA ¶ 16,661 (substantial compliance doctrine rejected when no shipment and 90 day extension would have been needed); *see* Microlab/FXR, ASBCA No. 31996, 86-3 BCA ¶ 19,032 (no substantial compliance when no delivery of first articles).

[94]Gillett Mach. Rebuilders, Inc., ASBCA Nos. 28341, 28958, 89-3 BCA ¶ 22,021 (contractor admitted knowing that work was not acceptable; hence, government not required to offer opportunity to correct defects).

demonstrating noncompliance. As the court in *Radiation Technology* said:

> [The contractor must] demonstrate that he had reasonable grounds to believe that his delivery would conform to contract requirements. Shipment alone is not an adequate badge of proof.[95]

Thus, in *Environmental Tectonics Corp.*,[96] the contractor "knowingly shipped the sterilizers in defective condition with the expectation, not warranted by the terms of the contract, that it would be permitted to rework the units and correct defects at the delivery site." The board ruled that this hasty attempt to satisfy a delivery date did not afford the contractor the protection of *Radiation Technology* because the contractor had no reasonable ground to believe that the items conformed to the specifications.[97]

A contractor's belief that goods will fulfill the government's needs is not the same as a reasonable belief that the goods comply with the contract requirements. In *Kurz-Kasch, Inc.*,[98] a contractor, having extensive experience with the government on contracts for similar items, knew that the government could "live with" nonconforming rifle guards. The

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[95]366 F.2d at 1006, 177 Ct. Cl. at 233.

[96]ASBCA No. 20340, 76-2 BCA ¶ 12,134 at 58,330.

[97]*Id.*, *see* Meyer Labs, Inc., ASBCA No. 18347, 77-1 BCA ¶ 12,539 (no reasonable grounds to believe goods conformed when parts installed despite previous rejection of same parts by government).

[98]Kurz-Kasch, Inc., ASBCA No. 32486, 88-3 BCA ¶ 21,053.

contractor had no intention of seeking a cure period but sought to convince the government to accept deviations. The ASBCA ruled that submission of items deviating from the specifications was not substantial compliance because of the contractor's knowledge of the noncompliance. Similarly, a contractor who ignored the specifications and redesigned storage bins in a misguided effort to improve the items, was unable to argue that delivery was made with reasonable grounds for believing that the items conformed to the contract requirements.[99] The ASBCA has also held that significant deviations may justify the conclusion that the contractor had no reasonable basis to believe the goods were in substantial compliance with the specifications.[100] Furthermore, failure to inspect or test the goods prior to shipment militates against finding a contractor reasonably believed its goods conformed to the specifications.[101] Thus,

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[99]Delphi Indus., Inc., AGBCA No. 76-160-4 A and B, 84-1 BCA ¶ 17,053.

[100]Yankee Telecommunication Laboratories, Inc., ASBCA No. 26308, 85-1 BCA ¶ 17,786 (142 first increment units substantially defective; thus, contractor "knew or reasonably should have known that those units did not conform to contract requirements"); Century Hone Division of Desert Laboratories, Inc., ASBCA No. 18360, 78-1 BCA ¶ 12,990 (honing machine performed at 10% of required level; hence, unreasonable to believe item conformed to specifications); Filcon Corp., ASBCA No. 19578, 75-1 BCA ¶ 11,303 at 53,887 (contractor "did not have a reasonable basis for concluding that [pneumatic tube carriers of improper dimensions] were in substantial compliance with contract requirements").

[101]*See* Meyer Labs, Inc., ASBCA No. 18347, 77-1 BCA ¶ 12,539 (improper inspection/testing devices used; hence, no reasonable grounds to believe that delivery conformed); Solar Laboratories, Inc., ASBCA No. 19269, 74-2 BCA ¶ 10,897 (despite absence of contractual duty to test, failure to inspect or test prior to shipment negated any reasonable basis for believing chemical heating pads conformed with contract); Kain Cattle Co., ASBCA No. 17124, 73-1

the linchpin is whether the contractor has a *reasonable* basis to believe the goods conform.

(3) Minor Defects

The defects must be "minor in nature and extent and susceptible to correction within a reasonable time."[102]

(a) Evaluating the Defect

Whether a defect is minor is highly fact intensive; thus, the cases have evaluated the nature of the defect,[103] the utility of the product provided,[104] and the time required for correction.[105] For example, a contractor delivering products

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BCA ¶ 9999 (contractor's failure to inspect improperly trimmed meat belied any reasonable belief of conforming goods).

[102]Radiation Technology, 366 F.2d at 1006, 177 Ct. Cl. at 232.

[103]*See* Environmental Tectonics Corp., ASBCA No. 29947, 87-1 BCA ¶ 19,382 (neither misalignment of tracks for loading cart and sterilizer, nor bow in sterilizer chamber were minor defects); S.A.F.E. Export Corp., ASBCA Nos. 26880, 26906, 84-1 BCA ¶ 17,126 (smoke detectors deviated from specifications and improperly installed; not minor defects); Filcon Corp., ASBCA No. 19578, 75-1 BCA ¶ 11,303 (improperly sized and poorly constructed pneumatic tube carriers may have become stuck in system).

[104]*See* Delphi Indus., Inc., AGBCA No. 76-160-4 A and B, 84-1 BCA ¶ 17,053 (storage bins delivered not usable for the purpose intended; thus, doctrine was inapplicable); Enviromarine Systems, Inc., IBCA No. 1386-8-80, 82-2 BCA ¶ 16,089 (no substantial compliance when timers unusable due to defects and extensive readjustments required to correct).

[105]*See* Introl Corp., ASBCA No. 27610, 85-2 BCA ¶ 18,044 (incorrect dimension of motor not minor when 18-20 weeks required to modify).

failing to pass life cycle testing was not in substantial compliance because a cure would have required redesign and new production.[106] Also, the sheer number of defects may cumulatively negate application of the doctrine.[107]

Substantial compliance has also been held inapplicable when a contractor violated collateral provisions of the contract. In *Modular Devices, Inc.*,[108] the contract items were procured from a large business in violation of the Small Business Set Aside requirements. Additionally the contractor was not a manufacturer of the item as required by the Walsh-Healy Act. Thus, the ASBCA ruled that the contractor was not in substantial compliance.

(b) Cure Period

The defects must be "susceptible to correction within a

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[106]Nuclear Research Corp., ASBCA Nos. 28641, 28979, 86-2 BCA ¶ 18,953.

[107]Applied Devices Corp., ASBCA No. 23945, 86-3 BCA ¶ 19,089 at 96,471 ("mass of defects here is such that they must collectively be given the effect of major defects"); Delphi Indus., Inc., AGBCA No. 76-160-4 A and B, 84-1 BCA ¶ 17,053 (workmanship deficiencies in storage bins); *see* Astro Science Corp. v. United States, 471 F.2d 624, 627, 200 Ct. Cl. 354, 359 (defects cumulatively supported termination for default). A contractor has argued that "an accumulation of defects may be considered minor when compared with the relative complexity of the item delivered." Environmental Tectonics Corp., ASBCA No. 20340, 76-2 BCA ¶ 12,134 at 58,330. Nonetheless, the board rejected this argument because the defects required substantial readjustment. *Id.*

[108]ASBCA No. 33708, 87-2 BCA ¶ 19,798.

reasonable time."[109] The time to be allowed is not governed by mathematical precision. Rather, the cure period will depend upon the circumstances of each case. When the government urgently needs the items, the standard for substantial compliance may be more stringent.[110] In *Technics EMS, Inc.*,[111] the GSBCA considered the procurement of an ion mill urgently needed by the National Bureau of Standards (NBS). Noting that the contractor was located in close geographic proximity to the NBS, the board ruled that "a cure period of seven days was reasonable, perhaps even generous."[112] The ASBCA has similarly approved a ten day cure period.[113]

The absence of any attempt to cure the defect may preclude

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[109]Radiation Technology, 366 F.2d at 1006, 177 Ct. Cl. at 232.

[110]Delphi Indus., Inc., AGBCA No. 76-160-4 A and B, 84-1 BCA ¶ 17,053 at 84,908 ("need for [storage bins] had become urgent by the time the inadequate response to the cure notice had been received"); Enviromarine Systems, Inc., IBCA No. 1386-8-80, 82-2 BCA ¶ 16,089 (urgent need was factor in rejecting substantial compliance).

[111]GSBCA No. 6679-COM, 84-1 BCA ¶ 17,060.

[112]*Id* at 84,963; *see* Enviromarine Systems, Inc., IBCA No. 1386-8-80, 82-2 BCA ¶ 16,089 (although cure period was not discussed, board upheld default termination when the contractor failed to submit conforming goods four days after originally rejected for noncompliance).

[113]Gooden Pump, Ltd., ASBCA No. 27084, 83-2 BCA ¶ 16,895 at 84,067 (10 days was "reasonable period of time in which to complete performance of the contract"); *cf.* Southland Constr. Co., VABCA Nos. 2217, 2543, 89-1 BCA ¶ 21,548 (seven to ten days considered prompt in context of replacing or correcting rejected item); Environmental Tectonics Corp., ASBCA No. 29947, 87-1 BCA ¶ 19,382 (discussing period allowed to correct sterilizer deficiencies in terms of reasonable forbearance rather than waiver).

a contractor from invoking *Radiation Technology*.[114] For example, in *Appli Tronics*,[115] the contractor had known of the defects in the communications hardware four months before the default termination; however, it had made no effort to rectify the situation. The ASBCA ruled that the materiality of the defects was moot in view of the contractor's insistence that no defects existed and that no corrective action was needed. Thus, the board declined to invoke the substantial compliance doctrine.[116]

(c) Practical Application

The instant inquiry is analogous to the common law characterization of a breach as material or minor; therefore, the key analysis should be focused upon the degree of impairment of the government's bargain. To ask whether a defect is minor and whether it can be corrected in a reasonable time is

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[114]Kurz-Kasch, Inc. ASBCA No. 32486, 88-3 BCA ¶ 21,053 at 106,334 (*Radiation Technology* inapplicable when contractor "had no intention of seeking time to cure the defects;" contractor wanted more time to convince government to allow deviations of the rifle hand guards); *see* J. CIBINIC, JR. & R. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 684-85 (2d ed. 2d printing 1986) and cases cited therein ("[i]t has been stated that there is no requirement for the contracting officer to direct that the goods be corrected and that absence of a contractor expression of willingness to cure may defeat application of the doctrine"); *cf.* Delphi Indus., Inc., AGBCA No. 76-160-4 A and B, 84-1 BCA ¶ 17,053 (in context of cure notice, whether government should have extended performance time was immaterial when contractor did not intend to replace defective bins).

[115]ASBCA No. 31540, 89-1 BCA ¶ 21,555.

[116]*Id.*

redundant. A defect cannot be minor if it is not correctable in a reasonable time. Likewise, if a defect is correctable in a reasonable time, it is not major. The cases provide a sound rule of thumb: when the correction cannot be accomplished within 10 days, *Radiation Technology* is inapplicable.[117] When the correction can be made within 10 days, the contractor has probably substantially complied.[118] Even when the government's need is urgent, reprocurement will rarely occur sooner than ten days; thus, the most expedient course will be to permit correction.

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[117]Gooden Pump, Ltd., ASBCA No.27084, 83-2 BCA ¶ 16,895 (10 days reasonable time to allow contractor to complete performance of contract); Boston Pneumatics, Inc., GSBCA No. 3788, 74-2 BCA ¶ 10,752 (termination upheld when contractor admitted it could not correct the impact wrench within 10 days); *see* Appli Tronics, ASBCA No. 31540, 89-1 BCA ¶ 21,555 (no substantial compliance when four months allowed to correct before termination); Inforex, Inc., GSBCA No. 3859, 76-1 BCA ¶ 11,679 at 55,730 ("when a contractor delivers goods so defective that they cannot be made to meet specifications within a reasonable time, let alone the time set in the contract for delivery, the Contracting Officer is justified in terminating the contract without giving a 10-day cure notice").

[118]*See* Cosmos Engineering, Inc., ASBCA No. 19780, 77-2 BCA ¶ 12,713 (10 days to correct work on audio-visual equipment reasonable under the circumstances; hence, substantial completion doctrine applied); Argent Indus., Inc., ASBCA No. 15207, 71-2 BCA ¶ 9172 (substantial compliance when correction would have taken only 10 minutes).

CHAPTER III

DELIVERY FAILURE LIMITATIONS: SUBSTANTIAL COMPLETION, SEVERABILITY, FIRST ARTICLES & INSTALLMENTS

A. Introduction

This chapter transitions from the analysis of when a contract may be terminated for default to an examination of what portion of a contract may be terminated. For example, in contrast to the doctrine of substantial compliance, which entitles the contractor to extra time to perfect performance, substantial completion may protect the construction contractor against default termination of its completed work. Thus, the government may terminate only the executory portion of the contract. Severability of contracts also affects the extent of the government's right to terminate for default. This chapter examines the substantial completion doctrine in construction and service contracts. The distinctive aspects regarding severability, first articles, and installment contracts are also explored.

B. Substantial Completion

The differences between substantial compliance and

substantial completion are significant.[119] Under substantial compliance the government retains its right to terminate the entire contract unless the contractor cures the defect within a reasonable time; however, under substantial completion, the government may only terminate the executory portion of the contract.[120] Thus, when the contractor fails to correct punchlist items, the government may exercise its right to terminate for default.[121] Substantial completion applies regardless of the contractor's opinion concerning the conformity of its work; however, a prerequisite to substantial compliance is the contractor's reasonable belief that its tender was

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[119]J. CIBINIC, JR. & R. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 680 (2d ed. 2d printing 1986).

[120]*Id.*; *see* Southland Constr. Co., VABCA No. 2217, 89-1 BCA ¶ 21,548 at 108,445 ("[e]ven though a construction contractor has substantially completed the project, the Government may nevertheless terminate the uncompleted portion of the contract for default in the event that the contractor refuses to complete punch list items or fails to complete them within a reasonable period of time"); Olson Plumbing and Heating Co., ASBCA Nos. 17965, 18411, 75-1 BCA ¶ 11,203 *aff'd* 602 F.2d 950 (Ct. Cl. 1979) ([e]ven if there had been substantial completion, the Government had the right to terminate the uncompleted work").

[121]Southland Constr. Co., VABCA No. 2217, 89-1 BCA ¶ 21,548; U.S. Royal Indus., PSBCA Nos. 1026, 1027, 83-2 BCA ¶ 16,673 (although most of work remaining was in nature of punch list items, default termination not precluded); Mil-Pak Co., Inc., PSBCA No. 609, 80-1 BCA ¶ 14,230 (default termination proper when contractor refused to correct punch list items); G. A. Karnavas Painting Co., VABCA No. 992, 72-1 BCA ¶ 9369 (default termination proper when contractor failed to correct punch list items). *But see* K & M Constr., ENG BCA Nos. 3118, 3183, 2998, 73-2 BCA ¶ 10,034 at 47,108 (default termination improper where deficiencies were "of a kind every construction contractor routinely experiences on every job of this kind with some being so absolutely trivial as to call for the application of the rule 'de minimis' [citation omitted]").

acceptable.[122] Finally, whereas the effect of substantial compliance is to bar termination for inconsequential defects, the essence of substantial completion is preservation of the contract price less deductions for minor defects.

(1) Construction Contracts

(a) Substantial Completion Preserves the Contract Price

The purpose of the substantial completion doctrine is to preserve the contract price as the measure of the value of the contractor's performance. As Professors Nash and Cibinic explain, "the better reasoned decisions recognize that the true effect of substantial completion is to prevent the Government from avoiding the obligation to pay the contract price for the substantially completed work."[123] The boards and courts, however, have not analyzed the issue under that framework.

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[122] J. CIBINIC, JR. & R. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 680 (2d ed. 2d printing 1986).

[123] *Id.* at 686. *See* Edward S. Good, Jr., ASBCA No. 10514, 66-1 BCA ¶ 5362 (default termination overturned; government awarded reasonable value of unperformed work); 3A A. CORBIN, CONTRACTS § 701 at 314-15 (1981) ("a contractor who has rendered 'substantial performance' of the promised equivalent of the contract price can get judgment for that price, with a deduction for minor defects and nonperformance").

(b) Discussion of Forfeiture Clouds the Analysis

The purpose of substantial completion is obscured by the discussion of forfeiture. Some boards and courts consider the primary purpose of the doctrine to be the avoidance of forfeiture. For example, the Court of Claims noted in *H.L.C. & Associates Constr. Co. v. United States*,[124] that the objective of the substantial performance[125] doctrine "is to prevent forfeiture, and the test of forfeiture usually is that the owner's [insistence upon strict compliance with a contract requirement], if followed, would amount to economic waste."[126] The ASBCA also has grappled with the notion of forfeiture in substantial completion analysis. In *General Ship & Engine Works, Inc.*,[127] the ASBCA noted that the construction contract provides for payment for partially completed work and materials delivered to the site, and held, "where a contractor has been paid or given credit for all work properly performed or corrected, there is less likelihood that a showing of forfeiture may be made so as to call for the application of the doctrine of substantial

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[124]367 F.2d 586, 176 Ct. Cl. 285 (1966).

[125]The terms "substantial performance" and "substantial completion" have been used interchangeably by the courts and boards.

[126]367 F.2d at 600; 176 Ct. Cl. at 309; *see* Franklin E. Penny Co. v. United States, 524 F.2d 668 (Ct. Cl. 1975) ("[s]ubstantial performance...refers to the equitable doctrine that guards against forfeiture").

[127]ASBCA No. 19243, 79-1 BCA ¶ 13,657.

performance and to upset an otherwise proper termination for default."[128] In *Mark Smith Constr. Co., Inc.*,[129] the board evaluated a contract for the replacement of a swimming pool filter system. The contractor had been paid on a percentage of completion basis for 95% of the work and terminated for default on the remainder. Noting that the basic rationale of substantial completion "is to guard against forfeiture and economic waste," the board, in *dicta*, rejected application of the doctrine.[130] Thus, the ASBCA deemed forfeiture an essential element for application of the doctrine of substantial completion.[131]

The board failed to recognize that the purpose of substantial completion is to preserve the contractor's right to the contract price, not to avoid a forfeiture. For example, no board would deny that a contractor may be terminated for default when a building it has constructed is structurally unsound, even

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[128] *Id.* at 67,022.

[129] ASBCA Nos. 25058, 25328, 81-2 BCA ¶ 15,306.

[130] *Id.* at 75,792. The board noted that even if the doctrine applied, "the project was not ready for its intended use as required before it may be considered substantially complete."

[131] *See* Tri-M Builders, AGBCA Nos. 83-225-1 *et al.*, 87-3 BCA ¶ 19,972 (principle invoked to avoid harsh penalty of forfeiture if only minor deviation and government has received benefit anticipated under contract); *but see* R. M. Crum Constr. Co., VABCA No. 2143, 85-2 BCA ¶ 18,132 (ruling that forfeiture will be considered but is not an essential element if the contract has otherwise been substantially performed).

if it would suffer a total forfeiture.[132] Nonetheless, discussion of forfeiture is relevant when it is accompanied by economic waste. Economic waste is present when insistence on strict compliance would not reasonably further the desired objective. For example, in *Jacob & Youngs v. Kent*,[133] Judge Cardozo found substantial performance when the contractor installed pipes of equivalent quality but not of the brand required under the contract. Judge Cardozo refused to enforce the owner's insistence on strict compliance because the building was satisfactory and correction entailed the destruction of foundation, walls, and floors. Thus, the presence of economic waste is representative of situations where the delivered performance may not have substantially impaired the government's bargain.

The risk of forfeiture is merely incidental to the analysis of whether the contract has been substantially performed and whether the government may refuse to pay the contract price.[134] Professor Williston described the mechanics of the doctrine as

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[132]*See* Tri-M Builders, AGBCA Nos. 83-225-1 *et al.*, 87-3 BCA ¶ 19,972, where the board upheld a default termination when the concrete poured by the contractor failed to pass strength and mix tests. The work was removed and replaced in its entirety and the contractor was liable for excess reprocurement costs.

[133]230 N.Y. 239 (1921).

[134]The board's reasoning with regard to forfeiture is fallacious on another ground as well. The construction contractor is paid for work satisfactorily accomplished; therefore, the only loss it may allege is profit. Furthermore, if the value of the work performed is determined by the market price, then that price may well include profit.

follows:

> Where a contractor has in good faith made substantial performance of the terms of the contract, but there are slight omissions and defects, which can be readily remedied, so that an allowance therefor out of the contract price will give the other party in substance what he bargained for, the contractor may recover the contract price, less the damages on account of the omissions. But the rule does not apply where the deviations from the contract are such that an allowance out of the contract price would not give the other party essentially what he contracted for.[135]

The ASBCA's requirement of forfeiture may be reconciled with the true purpose of substantial completion by viewing it as a convoluted method to determine when the government is disputing its liability for the contract price. In other words, the ASBCA's requirement of forfeiture will be present when the government has refused to pay for work performed. Consequently, that refusal may trigger an inquiry into the validity of using the contract price as the measure of performance. This strained interpretation of the board's forfeiture analysis is specious. The better view is that the board has failed to appreciate the true effect of the doctrine of substantial completion.

(c) Analysis of the Cases

The cases reveal a lack of clarity of analysis of the substantial completion doctrine. The boards discuss the doctrine by stating the test, applying the test, and resolving

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[135]6 S. WILLISTON, SALES, § 842 (3d ed. 1962) at 169 (quoting Birch Cooley v. First Nat'l Bank of Minneapolis, 86 Minn. 385).

the controversy, without recognizing that the key issue is whether the contractor should be able to preserve the contract price. Thus, the construction contractor will likely recover the contract price less deductions for uncompleted work whether the contract is substantially completed or not.

(i) Contracts Substantially Completed

As discussed above, when a contract is substantially completed, the contractor preserves the contract price as the measure of value for his performance. However, the government retains the right to terminate the uncompleted work, because the time for completion has passed.[136] Accordingly, the government is also credited with the value of the unperformed work. For example, the ASBCA, in *Edward S. Good, Jr.*,[137] considered whether a contractor had substantially completed a contract to renovate a commissary building. The contractor had completed more than 99% of the work, leaving three punch-list type items. Ruling that the contract had been substantially completed, the board held that the termination for default was improper, but that the government could recover the value of the unperformed work. This is a rare case where a board has articulated the government's right to recover for the uncompleted work.

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[136]Olson Plumbing and Heating Co., ASBCA Nos. 17965, 18411, 75-1 BCA ¶ 11,203 (citing R. NASH, JR. & J. CIBINIC, JR. FEDERAL PROCUREMENT LAW 672).

[137]ASBCA No. 10514, 66-1 BCA ¶ 5362.

(ii) Contracts Not Substantially Completed

When the contractor has not substantially completed the contract, it should not be entitled to remuneration based on the contract price. It may recover in restitution, the common law remedy limiting the breaching contractor to the value of the benefit conferred less breach damages.[138] For example, in *Mark Smith Constr. Co.* discussed above, the ASBCA rejected application of substantial completion and noted that the measure of recovery was "the value of the work in place...at the time of termination."[139] Nonetheless, the board computed the contractor's recovery by using the contract price less deductions for the value of the uncompleted work without discussing its rationale for using the contract price as the measure of benefit conferred. In *Two State Constr. Co.*,[140] the Transportation Board ruled that the contractor had not substantially completed a contract to construct an airport control tower. The board did not address how to measure damages, but arrived at the contractor's recovery for the value of work performed, by multiplying the percentage of completion by the total contract price. Despite rejecting application of

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[138]Professor Corbin describes the remedy as "the right to reasonable compensation for value received by the defendant over and above the injury suffered by the contractor's breach." 3A A. CORBIN ON CONTRACTS § 710 at 342.

[139]ASBCA Nos. 25088, 25328, 81-2 BCA ¶ 15,306 at 75,794.

[140]DOT CAB Nos. 78-31 *et al.*, 81-1 BCA ¶ 15,149.

the substantial completion doctrine, the VABCA, in *R. M. Crum Constr. Co.*,[141] similarly used the contract price to determine the contractor's quantum of recovery.

The boards' resolutions may be attributable to the fact that it is easier to determine the value of a small percentage of work to be performed than to evaluate the worth of a partially completed building.[142] In the former, it is easy to obtain quotes for the work left to be done. In the latter, it is difficult to directly evaluate the worth of a building with inoperative air conditioning or a leaking roof. In practical terms, the value of an incomplete building may very well be the contract price less the cost to complete or repair.[143] The boards' approach is not unreasonable; however, it obscures the true effect of substantial completion analysis. The lack of recognition of the true purpose of substantial completion has, therefore, led to a result where the computation of the recovery due the contractor will be the same whether it proves

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[141]VABCA No. 2143, 85-2 BCA ¶ 18,132.

[142]*See* H.L.C. & Associates Constr. Co. v. United States, 367 F.2d at 600, 176 Ct. Cl. at 309, where the court notes two methods of valuing the uncompleted work. Some courts measure the damages as the cost of replacement, while others allow "only the difference between the value of the structure as completed and the value it would have had if the proper installations had been made."

[143]Professor Corbin discusses the measure of recovery for a breaching contractor who has not substantially performed: "In proving the reasonable value of a part performance, the contract price or rate of payment is nearly always admissible in evidence on the issue of value. If the contract price is evidence of reasonable value, then contract price less damages will not greatly differ from reasonable value less damages." 3A A. CORBIN ON CONTRACTS § 710 at 343.

substantial completion or not.[144] Thus, as a practical matter, a contractor completing more than a minor amount of work will probably recover the contract price less the value of the unperformed work because 1) the government probably has no objection to such a computation; and 2) the boards have not been willing to tackle the daunting task of otherwise computing the value of the benefit conferred.

(iii) The Test of Substantial Completion

The test for substantial completion is whether the government has obtained the benefit of its bargain: whether the contractor's performance has yielded a project that the government may use as intended. A rigid percentage of completion test has been rejected. In *Joseph Morton Co.*,[145] the GSBCA rejected application of the substantial completion doctrine when the contractor had completed 95% of the contract, explaining: "[t]he true test is whether or not the project is complete enough to be occupied and used by the Government for the purposes for which it was intended."[146] Thus, discerning

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[144]The assessment of excess reprocurement costs or liquidated damages will provide the contractor with the incentive to contest a default termination.

[145]GSBCA No. 4876, 82-2 BCA ¶ 15,839.

[146]*Id.* at 78,525. The controversy involved a contract for renovation of a courthouse where the contractor completed 95% of the work, but failed to correct the air conditioning system as well as nearly 700 minor defects. The decision addressed only the propriety of the termination; therefore, no

the intended purpose of the contract as a whole, is essential to the evaluation. In *Two State Constr. Co.*,[147] the Transportation Board considered a contract for construction of air traffic control buildings. The board explained that a determination of substantial completion examines the intended purpose of the facility and whether it is capable of serving that purpose. Finding the deficiencies numerous and more than merely cosmetic in nature, the board ruled that the entry of government personnel to install equipment was not dispositive. The board commented, "[t]hat an owner is willing to risk hazards to expedite ultimate availability of a project for the intended use does not mean the project is capable of intended use."[148]

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ruling was made on the contractor's recovery or on reprocurement costs. The contractor had been paid 95% of the contract price for the completed work.

[147]DOT CAB Nos. 78-31 *et al.*, 81-1 BCA ¶ 15,149.

[148]*Id.* at 79,939. Although the evidence showed that the project was over 98% complete, the board focused on the adverse effect of the uncompleted work. For example, the lack of lightning protection, a safety gate, and an inoperable air conditioning thermostat demonstrated that the facility was not substantially complete for purposes of default termination. *See* R. M. Crum Constr. Co., VABCA No. 2143, 85-2 BCA ¶ 18,132, where the Veterans Administration had contracted for replacement of steam lines under the floors of an animal care facility and a building housing electron microscopes, at a price of $24,803. At termination the contractor had completed replacement of the pipes but had yet to replace virtually all of the tile removed from the area, work valued at approximately $3000. Although the facility was in use, operations over the unfinished floor were inconvenient. The board ruled that the government's use of the facility was not controlling, but analyzed whether "the remaining work, given the context of the contract, was of such a minor nature that to all intents and purposes, the Government received all the benefits it reasonably anticipated receiving under the contract." Finding that a major objective of the work remained uncompleted, the board held that the contract was not substantially completed.

Performance will be evaluated under the totality of the circumstances. In *Corway, Inc.*,[149] the ASBCA determined whether a tennis court was substantially complete by considering "the nature of the work itself, the degree of usability of the item as of the date of completion and the urgency of Government requirements." Finding that the defects were cosmetic in nature, outside of the playing surface, and correctable in an hour, the board overturned the default termination.[150]

(2) Service Contracts

(a) The Substantial Completion Analysis

Substantial completion in service contracts is sometimes complicated by the repetitive nature of the services required. Periodic services have periodic due dates; therefore, unlike construction contracts, the unperformed work is not in default until the new date arrives. For example, in a contract for daily janitorial services, each failure to perform a task as

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[149]ASBCA No. 20683, 77-1 BCA ¶ 12,357 at 59,804 (citing *Radiation Technology*).

[150]The opinion was silent as to whether the government was entitled to recover for the unperformed work. Inasmuch as the board ruled that the deficiencies could have been corrected in an hour, the damages were probably negligible.

required is a technical default.[151] Furthermore, in *Orlando Williams*,[152] the board noted that "the failure to perform a daily task is not cured by the performance of a similar task which is also required the following day. Each such failure is a default." Nonetheless, termination will not be appropriate until "a sufficient number of such failures...accumulate such that it could be said that there had been a substantial failure of performance."[153] Thus, in a service contract requiring periodic tasks, the government right to strict compliance with its specifications and concomitant right to default terminate, lies dormant until a certain threshold of performance failure is reached. This section attempts to discern what that threshold is.

(b) Application of the Doctrine

Not surprisingly, the analysis of what constitutes a substantial failure to perform is not susceptible to mechanical evaluation. Rather, the inquiry is fact intensive and not governed by formula. In reaching the issue of substantial failure to perform, the boards initially grappled with the

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[151]Suburban Indus. Maintenance Co., ASBCA Nos. 23750, 25154, 85-2 BCA ¶ 18,148. The default falls under paragraph (a)(1)(i) of the standard default clause, for failure to timely perform.

[152]ASBCA Nos. 26099, 26872, 84-1 BCA ¶ 16,983 at 84,597.

[153]Suburban Indus. Maintenance Co., ASBCA Nos. 23750, 25154, 85-2 BCA ¶ 18,148 at 91,096 (citing Reliable Maintenance Serv., ASBCA No. 10487, 66-1 BCA ¶ 5331).

question of whether a "cure" notice was a prerequisite to default termination.[154] In *Machelor Maintenance & Supply Corp.*,[155] the ASBCA ruled that a cure notice was unnecessary when a contractor failed to perform daily services because the termination was not a progress failure triggering a cure notice requirement, but a failure to timely perform.[156] This analysis has been widely accepted.[157]

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[154]The cure notice is required by FAR 52.249-8(a)(1) in conjunction with (a)(2) providing in pertinent part:

> (a) (1) The Government may, subject to paragraphs (c) and (d) below, by written notice of default to the Contractor, terminate this contract in whole or in part if the Contractor fails to --
>
> (i) Deliver the supplies or to perform the services within the time specified in this contract or any extension;
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> (ii) Make progress, so as to endanger performance of this contract (but see subparagraph (a)(2) below); or
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> ***
>
> (2) The Government's right to terminate this contract under subdivisions (1)(ii) and (1)(iii) above, may be exercised if the Contractor does not cure such failure within 10 days (or more if authorized in writing by the Contracting Officer) after receipt of the notice from the Contracting Officer specifying the failure.

[155]ASBCA No. 7502, 1962 BCA ¶ 3411.

[156]The "cure" notice is not required under FAR 52.249-8(a)(1)(i) nor under the predecessor clause operative in the instant case. *See* note 154, *supra*.

[157]*E.g.*, Johnson Energy Mgt. Co., Inc., VABCA Nos. 2905, 2910, 90-1 BCA ¶ 22,636; Collins Tailor Shop, ASBCA No. 36657, 89-1 BCA ¶ 21,486; Greenleaf Distrib. Serv. Inc., ASBCA No. 34300, 88-3 BCA ¶ 21,001; Carolina Maintenance Co., ASBCA No. 25891, 87-1 BCA ¶ 15,531; Pulley Ambulance, VABCA Nos. 1954, 1964, 84-3 BCA ¶ 17,655; Emancar, Inc., HUD BCA No. 80-534-C12, 82-2 BCA ¶ 15,531; Utah Waste Paper Co., VABCA No. 1104, 75-1 BCA ¶ 11,058.

(i) When Does the Right To Terminate for Default Ripen?

Periodic due dates are analogous to installments. Each discrete set of services may be separately breached; therefore, each deficiency may be analyzed as a failure to perform by the due date.[158] As noted above, the ASBCA in *Suburban Indus. Maintenance Co.*,[159] ruled that multiple failures must be present before the government may exercise its right to terminate.[160] Nonetheless, the HUD Board, in *Emancar, Inc.*,[161] stated that "a separate and distinct ground for default [arises] each and every time that [the contractor fails] to perform the contract services in full on time." Although the board did not qualify its statement, it does not necessarily follow that every default gives rise to a corresponding right to terminate for default. The facts of *Emancar* disclose that the government had twice rescinded terminations to permit the contractor the opportunity to improve performance. Thus, the government there did not terminate the contract until it had afforded the contractor a

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[158]*See* Cleanway Janitorial Serv., HUD BCA Nos. 79422-C41, 79423-C43, 80-2 BCA ¶ 14,792 at 73,011 ("Each failure to deliver services as they came due constituted a separate default on the contract").

[159]ASBCA Nos. 23750, 25154, 85-2 BCA ¶ 18,148 at 91,096.

[160]*See* Pride Unlimited, Inc., ASBCA No. 17778, 75-2 BCA ¶ 11,436 (numerous repeated deficiencies accumulated to negate substantial performance).

[161]HUD BCA No. 80-534-C12, 82-1 BCA ¶ 15,531 at 77,022.

grace period to rectify the situation.[162] The weight of authority recognizes that minor deficiencies will not sustain termination until they have accumulated to a significant number relative to the contract as a whole.[163]

(ii) Minor Failures Do Not Trigger the Right

The government's right to terminate for default is limited when the contractor's deficiencies are minor. For example, in

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[162]When the government works with the contractor to try to obtain satisfactory performance, the deficiencies commonly accumulate to a level permitting termination. *See* Suburban Indus. Maintenance Co., ASBCA Nos. 23750, 25154, 85-2 BCA ¶ 18,148 (government worked for two months with contractor meeting several times to iron out problems before termination); Gossette Contract Furnishers, GSBCA No. 6758, 83-2 BCA ¶ 16,590 (government worked with contractor for nine months trying to obtain satisfactory janitorial services before termination); Pride Unlimited, Inc., ASBCA No. 17778, 75-2 BCA ¶ 11,436 at 54,491 (ACO acknowledged possible start-up difficulties and worked with the contractor for six weeks before initiating default termination of contract for hospital cleaning). In Cervetto Bldg. Maintenance Co. v. United States, 2 Cl. Ct. 299 (1983), the Claims Court ruled that a cleaning contractor with 473 deficiency reports in three months of the contract had not substantially performed. *Id.* at 300-01. The court noted that "[w]hen deficiencies become the rule...necessitating corrections or deductions virtually every day, overall performance under the contract can be deemed unsatisfactory even though individual problems are resolved." *Id.* at 301. Thus, when the government must repeatedly take remedial action, this factor alone may "serve as the default, making termination an appropriate remedy." *Id.*

[163]*See* Suburban Indus. Maintenance Co., ASBCA Nos. 23750, 25154, 85-2 BCA ¶ 18,148 (each failure to perform an item of service is technically a default; "[h]owever for the contract to be terminated on that basis, a sufficient number of such failures must accumulate such that it could be said that there had been a substantial failure of performance"); Reliable Maintenance Serv., ASBCA No. 10487, 66-1 BCA ¶ 5331 at 25,044 ("[e]ach individual failure is technically a default, though not necessarily the basis for a default termination, and when a sufficient number of the individual defaults accumulate that it can be said the contract has not been substantially performed, the contract is then terminated").

C.S. Smith Training, Inc.,[164] the Transportation Board overturned the default termination of a contract to supply human subjects for scientific experiments. Noting that the government was dealing with a small contractor who was "tottering on the brink of cash flow catastrophe," the board ruled that the contractor's failure to timely pay subjects in approximately 19 instances out of a total of 410 payments did not justify the termination. The board commented that before a default termination for this relatively minor deficiency could be sustained, the government would have to provide the contractor with notice and an opportunity to cure.[165] Thus, the failures in performance may have sustained termination for failure to progress, if the contractor had failed to cure the problem after notice.

In *Handyman Bldg. Maintenance Co.*,[166] the Interior Board reversed a default termination where the contractor had failed to perform various janitorial services at several locations on repeated occasions. Fatal to the default termination was the contracting officer's failure to "make a determination that the individual omissions of service had accumulated to the point where it could be said that the contract was not being

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[164]DOT CAB 1273, 83-1 BCA ¶ 16,304.

[165]The board found that the contractor was never made aware of the forthcoming termination.

[166]IBCA Nos. 1335-3-80, 1411-12-80, 83-2 BCA ¶ 16,646.

substantially performed."[167] Although the case involved undertones of discrimination and government ineptitude in enforcing the inspection clause, the board specifically ruled that a "contract may be terminated for default only when the number of individual defaults have accumulated to the point where it may be said that the contract has not been substantially performed."[168]

In *Pulley Ambulance*,[169] the VABCA discussed a failure to perform two percent of 400 ambulance calls. The board stated that such performance would have been in substantial compliance with the contract requirements; however, the quality of service on calls actually performed was frequently substandard. The board, therefore, ruled that the default termination was proper.[170] Review of *C.S. Smith, Handyman, and Pulley* discloses that when the deficiencies represent a small proportion of the contract as a whole, the contractor is substantially performing.

The nature of the non-performance as well as the number and frequency of the deficiencies are also important in the analysis. In *Itra Coop. Ass'n.*,[171] the GSBCA commented that

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[167]*Id.* at 82,775.

[168]*Id.* at 82,775.

[169]VABCA Nos. 1954, 1964, 84-3 BCA ¶ 17,655.

[170]*Id.* The VABCA had previously ruled in *Miller's Ambulance Service*, VABCA No.548, 67-1 BCA ¶ 6274, that a 2% failure rate involving 400 ambulance pickups did not permit the government to default terminate the contract for failure to perform.

[171]GSBCA No. 7974, 90-1 BCA ¶ 22,410 at 112,564.

> The principle of "substantial compliance" places a considerable limitation upon an agency's exercise of its right to terminate for default a service contract. Default termination is not justified where the number of deficiencies established by the Government is relatively minor compared to total level of services to be performed by the contractor.

There, a typewriter service contractor had failed to timely respond to 20 calls out of more than 1000 over a five month period, leading the board to rule that the government had failed to justify the termination.[172]

(iii) Failure to Deliver Critical Services Triggers the Right Immediately

When a contract requires provision of critical services, the government need not wait for an accumulation of deficiencies before terminating for default. In *Sentry Corp.*,[173] the contractor agreed to provide guard services for two training ranges, one of which contained classified and explosive material. The contractor performed satisfactorily for three months before failing to provide any guard services for 21 hours over two days.[174] Rejecting the contractor's assertion that a cure period was required before termination, the board held that

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[172]*Id.* The board also noted that the contract provision allowing deductions for untimely service responses supported a finding of substantial completion. *See* subsection (d) *infra*.

[173]ASBCA No. 29308, 84-3 BCA ¶ 17,601.

[174]*Id.* at 87,687. The deficiencies were caused primarily by labor disputes.

the government had the right to terminate "immediately after the [contractor] failed to perform the services at the times specified in the contract.[175]

(iv) Deductions for Deficiencies May Limit Right

Several cases have restricted the government's right to default terminate when the government has taken deductions for unsatisfactory work. In *W.M. Grace, Inc.*,[176] the ASBCA ruled that the government had waived its right to default terminate for performance failures when it had taken deductions for the unsatisfactory work.[177] In evaluating the default in *Wainwright*

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[175]*Id.* The board cited Milmark Services, Inc. v. United States, 2 Cl. Ct. 116 (1983). That case was a hybrid services/supply case where the Immigration and Naturalization Service (INS) contracted for the key punch services to create punch cards containing data from official forms. *Id.* at 117. The court remarked that the failure to timely deliver the punch cards was sufficient to sustain termination for default. *Id.* at 118. The INS, however, had allowed the contractor three months to improve its performance, despite the fact that at termination, the contractor had processed only 100,000 of the 3,600,000 documents required. *Id.* at 119. In Marble and Chance, HUD BCA No. 85-908-C2, 87-1 BCA ¶ 19,337, a contract to provide real estate closing services was properly terminated for default. The board stated: "Although the doctrine of substantial performance may prevent the Government from terminating for default, only the most minor failures of performance, when weighed against the scope and purpose of the contract, bring that doctrine into operation." *Id.* at 97,844.

[176]ASBCA No. 23076, 80-1 BCA ¶ 14,256.

[177]*Id.* at 70,230-31. Furthermore, the government's payment for services rendered, without deduction for known discrepancies, was deemed an acceptance barring termination for such performance. The board held that the government could not "ground a default termination upon the quality of performance of services which it has already accepted." Interpreting the Inspection of Services clause in the contract (ASPR § 7-1902.4 Nov 1971), the board held that the government had elected its remedy of taking a deduction to the exclusion of terminating for default. Thus, a right to terminate for

Transfer Co. of Fayetteville, Inc.,[178] the ASBCA refused to consider deficiencies for which deductions had been taken. Ruling that the gravity and repetitiveness of the remaining deficiencies were insufficient to justify termination, the board held that the services had been substantially completed.[179] In *Cervetto Bldg. Maintenance*,[180] the Claims Court ruled that the government may avoid this result by altering the contract to make its remedies cumulative. The ASBCA ruled similarly in evaluating a contract which reserved the right to terminate for default even after deductions have been taken for deficiencies.[181] The board held that deduction for deficiencies did not preclude termination for the same deficiencies. Therefore, the government may preserve its right to terminate for default even when deductions are taken by simply including such a clause.

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default would only arise after a new failure to perform services for which deductions had not been taken. The current clause at FAR § 52.246-4 is substantially similar.

[178]ASBCA Nos. 23311, 23657, 80-1 BCA ¶ 14,313.

[179]*Id.* at 70,537-38.

[180]2 Cl. Ct. 299, 302 (1983).

[181]Suburban Indus. Maintenance Co., ASBCA Nos. 23750, 25154, 85-2 BCA ¶ 18,148; *accord*, Orlando Williams, ASBCA Nos. 26099, 26872, 84-1 BCA ¶ 16,983.

(3) Summary

The cases reveal that the more critical the service involved, the fewer the number of deficiencies required to sustain default. Nonetheless, minor deficiencies will sustain termination if they are numerous or repeated. Similarly, a serious deficiency may permit termination immediately. The government bears the burden of proving substantial failure to perform; therefore, a close case will be resolved in favor of the contractor. The contractor and contract administrator are, therefore, guided only by reasonableness under the circumstances.

C. Installment Contracts

Uniform Commercial Code § 2-612(1) describes an installment contract as "one which requires or authorizes the delivery of goods in separate lots to be separately accepted." The Code, however, provides that the contract as a whole is breached only when a default with respect to one or more installments impairs the value of the contract as a whole.[182] The contractor in

[182]U.C.C. § 2-612(3) and comment 6. Professors White and Summers explain that "if the defect in the first shipment is such as to give 'reasonable apprehension' in the buyer's mind about the ability or willingness of the seller to complete the other installments, the breach should be regarded as a breach of the whole." J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 8-3 at 307 (2d ed. 1980).

Artisan Electronics Corp. v. United States,[183] cited this Code provision to argue for limiting the default to the first installment; however, the Court of Claims declined to even address the issue, because the contract authorized termination of "all or any part of the contract if delivery was not made within the time specified."[184] Thus, the rule in government contracts is well settled: "Where the contract provides for deliveries in increments...the failure to deliver any single increment affords an adequate basis for terminating the entire contract."[185]

Acceptance of a delinquent installment will not alter the government's right to terminate for subsequent defective deliveries, because the failure to timely deliver each increment generates an independent right to terminate the contract for default.[186] In *Cecile Indus., Inc.*,[187] the ASBCA noted that

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[183]499 F.2d 606, 205 Ct. Cl. 126 (1974).

[184]*Id.* at 611, 205 Ct. Cl. at 134.

[185]Mason's, Inc. and Mason Lazarus t/a Mason's Inc., ASBCA Nos. 27326, 28183, 86-3 BCA ¶ 19,250 at 97,360; *accord*, Lustro Plastics Co., GSBCA Nos. 7300 *et al.*, 86-2 BCA ¶ 18,814 at 94,811 ("in instances where the contract requires delivery in increments, the entire contract can be terminated for default when a default occurs on any increment"); Yankee Telecommunication Laboratories, Inc., ASBCA Nos. 25420 *et al.*, 85-1 BCA ¶ 17,786 (default in first increment justified termination of all increments); Cecile Indus., Inc., ASBCA Nos. 24600, 27625, 83-2 BCA ¶ 16,842 ("Government could terminate the entire contract in the event Cecile failed to make any one monthly delivery"); Prestex, Inc., ASBCA Nos. 21284 *et al.*, 81-1 BCA ¶ 14,882 at 73,602 ("[w]here the deliveries are in increments, the entire contract, rather than just the deliveries on which the contractor is in default, can be terminated for default").

[186]Novelty Prod. Co., ASBCA No. 21077, 78-1 BCA ¶ 12,989.

waiver of one or more delivery dates did not constitute a waiver of all later delivery dates.[188] Thus, the government may attempt to salvage a contract without the risk of losing its right to later default terminate if performance is not improved.

D. Severability

(1) The Basic Principle

The government's right to terminate a contract may be limited by the nature of the performance required. As the GSBCA has stated, "[i]n general, it is not appropriate to terminate an entire contract for default where it is possible to terminate only a severable portion of the work as to which an actual default has been demonstrated."[189] In *Murphy et al. v. United States*,[190] the Court of Claims interpreted the default clause as limiting the government right to terminate the whole contract

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[187]ASBCA Nos. 24600, 27625, 83-2 BCA ¶ 16,842 at 83,807.

[188]*Id.* at 83,807 (board ruled that the government had in fact waived the subsequent delivery date); *accord*, Prestex, Inc., ASBCA Nos. 21284 *et al.*, 81-1 BCA ¶ 14,882 at 73,602 (even if government waived right to default terminate for failure to timely deliver first increment, delivery dates for subsequent increments not waived; government retained right to terminate for failure to deliver any of later increments); Novelty Prod. Co., ASBCA No. 21077, 78-1 BCA ¶ 12,989 at 63,344 (waiver of first increment delivery date "did not automatically operate as waiver of delivery dates for subsequent increments").

[189]Itra Coop. Ass'n, GSBCA No. 7974, 90-1 BCA ¶ 22,410 at 112,564.

[190]164 Ct. Cl. 332 (1964).

when the deficiency consists of the contractor's failure to prosecute a separable part of the work. The clause provided in pertinent part:

> If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1, or any extension thereof,...the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise....[191]

The court ruled that the failure to prosecute a separable part of the contract did not trigger the right to terminate the whole contract. The court reasoned that "such separate treatment be not intended, the use of the words 'or any separable part thereof' is wholly superfluous."[192] The contract called for construction of a dam across the Pecos River in New Mexico. The contract also required the contractor to "arrange his operations to permit passage of irrigation releases past the dam" during certain times throughout construction.[193] Curiously absent from the decision was any discussion of the intent of the parties.[194] Although the court found that the irrigation work was "wholly

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[191] *Id.* at 334.

[192] *Id.* at 340.

[193] *Id.* at 335.

[194] *See* 17 Am Jur 2d §325 at 758 (1964) ("[t]he primary criterion for determining the question is intention of the parties as determined by a fair construction of the terms and provisions of the contract itself, by the subject matter to which it has reference, and by the circumstances of the particular transaction giving rise to the question").

separate from and incidental to the construction of the [dam]," it is inconceivable that the government and the contractor did not intend the two components to be interrelated, particularly when the contract contained specific language instructing the contractor to arrange its operations to permit the releases. The court held the contract for construction of a dam was improperly terminated when the contractor's failure in performance threatened only the irrigation releases but not completion of the entire dam. The termination for default was sustained only as to the failure regarding release of irrigation waters. Thus, the crux of the cases is not the intention of the parties but whether the severed work is independent of the remainder of the contract.

(2) Application of the Principle

Some cases may be categorized as situations where the government reserves the right to award items on an individual basis. These cases uniformly hold that such a contract is clearly severable. For example, in *R.E. Lee Elec. Co.*,[195] a contract for rehabilitation of an electrical system contained four discrete items. The government had reserved the right to make awards on an individual basis and, in fact, awarded the

[195]ASBCA Nos. 6195, 6447, 61-1 BCA ¶ 3002; *see* Timberline Reforestation, AGBCA No. 80-118 CDA, 80-2 BCA ¶ 14,662 (five items of tree planting severable).

contractor only two of the four items. Ruling that the contract was severable, the board discussed the intent of the parties and found no intent to make performance with respect to one item dependent upon performance of the other. Similarly, *Capitol City Constr. Co.*,[196] involved a contract to modernize an air traffic control center, where replacement of chillers were added to the contract by modification when the existing chillers were damaged. When the contractor failed to supply the chillers, the government terminated the entire contract for default. The board failed to discuss intent of the parties but noted the fact that the chillers were added by a modification and ruled that the default concerning the chillers was unrelated to the remaining work and, therefore, was severable.

The remainder of the cases are not neatly categorized.[197] Nonetheless, a corollary to the above rule reveals that when the items are separately priced and not interrelated, the contract will be divisible. In *Overhead Elec. Co.*[198] the contract for construction of an electrical substation, construction of extension power lines, and disposal of polychlorinated biphenyls

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[196]DOT CAB No. 74-29, 75-1 BCA ¶ 11,012.

[197]In a case that had little to do with severability, the GSBCA held that acceptable and unacceptable portions of a contract to paint buildings were separable. Nestos Painting Co., GSBCA Nos. 6945, 7490, 86-2 BCA ¶ 18,993 at 95,916. The board permitted payment of the 35% of the contract that had been properly performed. The issue was not one of severability, but of forfeiture because the contractor had conferred a benefit but that the government could not return. In order to avoid forfeiture, the board limited the termination for default to the defective portion of the work.

[198]ASBCA No. 25656, 85-2 BCA ¶ 18,026.

included separate prices for the individual projects. The ASBCA concluded that the contract was divisible because the items could have been procured separately and because separate prices for each item were evident.[199]

At issue in *Itra Coop. Ass'n*[200] was a typewriter service contract covering 50 different agencies in the San Francisco area. Of the 20 reported deficiencies underlying the termination for default, 16 were reported by one agency at one location.[201] The services at the different locations were similar, but were not interrelated. Pricing for the separate locations was ascertainable; therefore, the board held that termination of the entire contract was not appropriate.

In *Consumers Oil Co.*, [202] the ASBCA applied the severability doctrine to a contract involving the delivery of petroleum products to various military bases in the southwest. When some of the bases failed to timely pay invoices, the contractor abandoned performance of the entire contract. The provision of supplies to the bases were independent undertakings. Furthermore, the billing and, hence, the pricing was obviously contemplated to be computed for each individual location. The board held that the contract was severable into

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[199] *Id.*

[200] GSBCA No. 7974, 90-1 BCA ¶ 22,410 at 112,564.

[201] *Id.*

[202] ASBCA No. 24172, 86-1 BCA ¶ 18,647.

pairs of part performances corresponding to the different locations involved. The board ruled, therefore, that the contractor was not justified in discontinuing deliveries to locations that had not been delinquent in payments.

By contrast, when the contract is so interrelated that contracts for individual items could not reasonably be awarded on an individual basis, then the contract is not severable. Thus, even when components are individually priced, the contract is not necessarily severable. In *Penn. Exchange Bank et al. v. United States*,[203] the contract required the contractor to perform four steps. The first three separately priced steps required the contractor to attain and demonstrate the ability to mass produce microwave controlling devices, with the fourth step requiring the contractor to maintain readiness to produce the product for six years in case of a national emergency. After accomplishing the first three steps and receiving the contract price, the contractor breached the contract through its insolvency. The court rejected the assertion that the fourth step was separable and ruled that the government could recover damages for having to qualify another contractor. Although the fourth step was not priced, it was clear that the prices of the prior three steps were intended to include some amount for maintaining production potential as required by the fourth step. To that extent the contract was not really separately priced, but was a hybrid lump sum contract with costs of the fourth step

[203]170 F. Supp. 629, 145 Ct. Cl. 216 (1959).

embedded in the prices of the prior three. Furthermore, the steps were so closely related that contracts for the items could not possibly have been awarded on an individual basis.[204] Similarly, where a contract contained a lump sum price and the board was unable to deduce separate prices for an item, the contract was not severable.[205]

Thus, the severed work must be independent of the remainder of the contract and not priced in a lump sum that conceals individual prices.

(3) The Relationship of Severability and Installments

In contrast to severable contracts, installment contracts may be terminated *in toto* for breach of any one installment. As noted in Section C above, the court in *Artisan* summarily rejected the U.C.C. installment approach, requiring impairment of the entire contract before termination may be invoked. The Supply default clause therein, set forth the right to terminate all or part of a contract for enumerated reasons. Thus, the

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[204]*Cf.* Philip Bradley and Sons, AGBCA No. 314, 71-2 BCA ¶ 9002 (contract for rental of tractor with brush blade and U-dozer not severable when U-dozer not supplied; unreasonable to sever when two thirds of job required use of U-dozer).

[205]Telecommunications Consultants, ASBCA No. 13801, 69-2 BCA ¶ 7925 (lump sum contract for communications system and engineering study not severable despite work being independent; separate prices of components not evident) (quoting 6 S. WILLISTON ON CONTRACTS § 862 (3d ed. 1962) at 272: "If payment of a lump sum is to be made for several articles, the contract is necessarily indivisible").

court interpreted the clause to permit termination of all or part of the contract for breach of one installment. Unlike the *Artisan* default clause, the clause in *Murphy*[206] first set forth two instances that would sustain default: 1) failure to prosecute the work as a whole and 2) failure to prosecute a separable part thereof.[207] The clause then provided for termination of the whole contract or part of the contract, leading the court to rule that the clause did not permit termination of the whole contract for failure in a separable part thereof.

Thus, the *Murphy* reasoning does not apply to contracts containing the Supply/Service default clause. Nonetheless, the boards have held supply and service contracts to be severable without discussing the very clause which the Court of Claims had interpreted to allow total termination for breach of one installment.[208] The boards have apparently tacitly rejected the

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[206]*Murphy* is discussed at note 190 *supra*.

[207]*See* § C(1) above. The *Murphy* clause is substantially similar to the standard Construction default clause.

[208]*See* Umpqua Marine Ways, Inc., ASBCA Nos. 27790, 29532, 89-3 BCA ¶ 22,099 (contract to construct diving system module and alter diving boat); Eng'r Design and Dev., ENG BCA ASBCA No. 4179, 81-1 BCA ¶ 14,927 (procurement of six different multiple conductor cables). The board in *Umpqua* cited *R.E. Lee*, a construction case, and did not discuss or even acknowledge the tension between the plain language of the supply clause and the limits on termination that severability imposes. The board in *Eng'r Design* similarly did not discuss its rationale and failed to cite any authority for its holding. In Itra Coop., GSBCA No. 7974, 90-1 BCA ¶ 22,410 at 112,564, a services case, the GSBCA cited *Murphy* without discussing the differences in the supply and construction clauses. That case was essentially a substantial completion case; therefore, the discussion of severability appears to have been inserted as an afterthought.

plain language interpretation and apply the common law remedy of severability when the facts appeal to them. The opinions are largely devoid of analysis of the intent of the parties; thus, the Court of Claims' comment about intention of the parties in *Spartan Aircraft Co. v. United States*[209] is particularly appropriate: "examination of some of the many cases on the point suggests rather that resolution of the question has more commonly been a matter of the intention of the court."

E. Preproduction Articles

The standard for rejection of preproduction articles has been more lenient than the strict compliance standard applicable to end products.[210] In *National Aviation Electronics, Inc.*,[211] the ASBCA ruled:

> Deficiencies in a first article that are correctable in production are not a valid basis for an outright disapproval of a first article....The contract does not provide for subjecting the contractor to such a severe forfeiture as a default termination without any opportunity to correct defects when the only defects in the first article are of such a nature as to be correctable in production.[212]

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[209]100 F. Supp. 171, 173-74, 120 Ct. Cl. 327, 345 (1951).

[210]Advanced Precision Indus., Inc., ASBCA No. 34676, 89-2 BCA ¶ 21,597.

[211]ASBCA No. 18256, 74-2 BCA ¶ 10,677 at 50,752.

[212]*See* Acudata Systems Inc., DOT CAB Nos. 1198, 1233, 84-1 BCA ¶ 17,046 (contractor's "only consequence for failure to present a conforming prototype would be correction of any defects;" minor defects were easily correctable and did not sustain default termination).

(1) A First Article is Not an End Item

The government may not normally terminate a contract for first article noncompliance or nondelivery under a(1)(i) of the default clause. That provision applies to untimely delivery of services or end products. That was the holding in *Bailey Specialized Bldgs, Inc. v. United States,*[213] where the Court of Claims reversed a default termination when the government had failed to approve a preproduction model submitted for inspection in accordance with the contract schedule. The government's options were to approve the item or issue a cure notice for failure to make satisfactory progress.[214]

The distinction between preproduction models and end items was evident in *Int'l Tel. & Tel. Corp., ITT Defense Communications Div. v. United States,*[215] where the contract required delivery of one preproduction model. Although the contract did not require any production models, the Court of Claims treated the model as a first article and not an end item.[216] The court applied the less stringent first article

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[213]404 F.2d 355, 186 Ct. Cl. 71 (1968).

[214]*Id.* at 360, 186 Ct.Cl. at 77.

[215]509 F.2d 541, 206 Ct. Cl. 37 (1975).

[216]*Compare* AAR Corp., ASBCA No. 16486, 74-2 BCA ¶ 10,653 (first article test procedures not equivalent to first article test report; thus, failure to deliver did not trigger termination right under (a)(i)) *with* Inforex, Inc., GSBCA 3859, 76-1 BCA ¶ 11,679 (preproduction demonstration considered equivalent to first article).

standard, requiring that a default termination based upon rejection of a first article must be preceded by a cure notice and an opportunity to make corrections. The government's failure to issue a cure notice was fatal to the termination for default.[217]

(2) First Article Clause Modifies Termination Rights

The government may terminate a contract for first article delivery failure by including the standard first article clause, providing in pertinent part:

> If the Contractor fails to deliver any first article report on time, or the Contracting Officer disapproves any first article, the Contractor shall be deemed to have failed to make delivery within the meaning of the "Default" clause of this contract.[218]

Thus, the clause makes first articles and first article reports the equivalent of end items for purposes of termination under (a)(1)(i) for delivery failure. The cases reveal that the boards will enforce this clause, obviating the need for termination under (a(1)(ii) for progress failure and its requirement for a cure notice. The ASBCA held in *Penjaska Tool*

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[217]509 F.2d at 553, 206 Ct. Cl. at 59.

[218]FAR §§ 52.209-3(d) and 52.209-4(d); *cf.* Monitor Systems, ASBCA No. 14261, 71-1 BCA ¶ 8885 (contract did not contain clause; however, right to terminate accrued when the government stressed that failure to deliver preproduction items after extended delivery date would result in termination).

Co.,[219] that "this provision requires timely delivery of supplies that substantially conform to the contract requirements."[220] In a contract for 33,000 firing pins for M-14 rifles, the contractor failed to submit sufficient data in its first article test report to permit the government to properly evaluate the article. The incomplete test report supported summary termination without a cure notice.[221] Nonetheless, a first article defect "readily and easily correctable in the course of production" will not sustain a default termination even with the above clause.[222] The contractor bears the burden of proving that "the defect is correctable in the production process and neither evidence of prior successful manufacture of similar articles nor broad general assertions of correctability in production suffice."[223] Additionally, absent excusable

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[219]ASBCA No. 31836, 90-1 BCA ¶ 22,275.

[220]*Id.* at 111,892.

[221]*Id.* In Applied Devices Corp., ASBCA No. 23945, 86-3 BCA ¶ 19,089 at 96,471, "the multitude of defects found in the mechanical and workmanship inspections and the performance failures together [created] such a massive number of deficiencies as to amount to a major defect or defects and to prevent a finding that any of the four [first articles conformed] to the contract terms." Finding that the defects were not correctable in production, the board sustained the default termination. *Compare* Composites Horizons, ASBCA Nos. 25529, 26471, 85-2 BCA ¶ 18,059 (no first article clause in contract; thus, default termination improper for failure to deliver first production sample).

[222]Penjaska Tool Co., ASBCA No. 31386, 89-2 BCA ¶ 21,700 *aff'd on reconsid.* 90-1 BCA ¶ 22,275.

[223]Applied Devices Corp., ASBCA No. 23945, 86-3 BCA ¶ 19,089 (contract for missile parts properly terminated for default when first article failed performance tests).

delay, untimely delivery of a first article triggers the government's right to terminate under paragraph a(1)(i) of the default clause.[224]

[224]AeroParts, ASBCA No. 37822, 90-1 BCA ¶ 22,510 (failure to meet first article delivery date sustained default under (a)(i) of default clause); *accord*, Kit Pack Co., Inc., ASBCA No. 33135, 89-3 BCA ¶ 22,151 (failure to deliver first articles sustained default); Precision Mfg. of San Antonio, ASBCA No. 36630, 87-1 BCA ¶ 19,415 (failure to deliver first article sustained default); Microlab/FXR, ASBCA No. 31996, 86-3 BCA ¶ 19,032 (failure to deliver first article or test report sustained default); Birken Mfg. Co., ASBCA Nos. 30188 *et al.*, 85-2 BCA ¶ 18,155 (first articles failed to demonstrate that supplier understood and could perform manufacturing requirements; termination sustained); Kings Point Mfg. Co., Inc., ASBCA No. 27201, 85-2 BCA ¶ 18,043 (in *dicta*, board noted that failure to timely deliver first article would sustain default).

CHAPTER IV

PROGRESS FAILURES:

THE RIGHT TO TERMINATE BEFORE THE PERFORMANCE DATE HAS ARRIVED

A. Introduction

The previous two chapters have focused upon the right to default terminate after the date for performance has passed. This chapter now examines the right of the government to terminate before the due date has elapsed. The need for the option of terminating prior to the due date was illustrated in *Halifax Eng'r, Inc.*,[225] where the General Services Administration (GSA) contracted for the provision of guard services at several State Department buildings. When it became evident that the contractor would be unable to obtain the requisite number of qualified personnel prior to the start of performance on July 1, 1985, the GSA terminated the contract for failure to make progress.[226] The board noted that the progress failure concept "is designed to preclude the situation where the Government must wait until performance is due before it may terminate the contract and procure the services elsewhere."[227]

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[225]GSBCA No. 8173, 89-3 BCA ¶ 21,926.

[226]*Id.* at 110,320-21. The GSA had issued a cure notice and allowed the contractor a cure period to rectify the situation.

[227]*Id.* at 110,321.

Termination before the due date, therefore, was reasonable to permit the government to avoid leaving critical buildings without proper guard services.

The Supply/Services default clause provides for default termination if the contractor endangers performance of the contract by failing to make progress.[228] The government right to terminate does not mature until a valid cure notice is issued and the contractor is given at least 10 days to rectify the situation.[229] The Construction clause allows the government to default terminate if the contractor "refuses or fails to prosecute the work or any separable part, with the diligence that will insure" timely completion.[230] The Construction clause

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[228]FAR 52.249-8 provides in pertinent part:

> (a) (1) The Government may, subject to paragraphs (c) and (d) below, by written notice of default to the Contractor, terminate this contract in whole or in part if the Contractor fails to --
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> (ii) Make progress, so as to endanger performance of this contract (but see subparagraph (a)(2) below); or
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> ***
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> (2) The Government's right to terminate this contract under subdivisions (1)(ii)...above, may be exercised if the Contractor does not cure such failure within 10 days (or more if authorized in writing by the Contracting Officer) after receipt of the notice from the Contracting Officer specifying the failure.

[229]*Id.*; *see* Halifax Eng'r, Inc., GSBCA No. 8173, 89-3 BCA ¶ 21,926 at 110,319 ("[t]he issuance of a cure notice is an essential prerequisite to a termination for default for a contractor's failure to 'make progress'").

[230]FAR § 52.249-10 provides in pertinent part:

> (a) If the Contractor refuses or fails to prosecute the work

does not require any cure notice before termination. This chapter examines the test to determine whether the contractor is in default and discusses the application of the test in recent cases.

B. The Progress Failure Test

(1) Early Test Required Showing of Impossibility

Early interpretations of the default clause required the government to prove that timely completion was impossible.[231] Although the burden remains on the government to establish the default,[232] the impossibility test has been abandoned. The courts and boards now require a contracting officer to have a "reasonable, valid basis for concluding on the basis of the entire record, that there was no reasonable likelihood that [the contractor] could perform the entire contract effort within the

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> or any separable part, with the diligence that will insure its completion within the time specified in this contract including any extension,...the Government may, by written notice to the Contractor, terminate the right to proceed with the work (or the separable part of the work) that has been delayed.

[231] *See* J. CIBINIC, JR. & R. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 695 (2d ed. 2d printing 1986) and cases cited therein.

[232] Ener-Tech Automated Control Sys., Inc., ASBCA No. 31527, 89-3 BCA ¶ 22,091 ("burden of establishing [default termination] rests with the Government"); TMI, Inc., ENG BCA No. 5524, 89-3 BCA ¶ 22,029 (government "has the burden of proving the appropriateness of the default").

time remaining for contract performance."[233]

(2) Impossibility Test Abandoned

In *Discount Co. v. United States*,[234] the Court of Claims considered a default termination for failure to make progress in the construction of a campground. The facts indicated that after the cure period had expired, the contractor "had neither begun more-than-piddling construction activities at the campground, nor assured the Government that it could meet the completion deadline."[235] The court rejected the contractor's argument that the default was wrongful because the contractual time had not yet run.[236] Ruling that the termination was appropriate "if a demonstrated lack of diligence indicated that the Government could not be assured of timely completion," the

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[233]RFI Shield-Rooms, ASBCA Nos. 17374, 17991, 77-1 BCA ¶ 12,714 at 61,735. The ASBCA said "[t]he Government, then, is not obligated to prove the impossibility of [the contractor] being able to perform." *Id.* Similarly, the Court of Claims has said: "the default clause in this contract did not require a finding that completion within the contract's time limitations was impossible." Discount Co. v. United States, 554 F.2d 435, 441, 213 Ct. Cl. 567, 575 (1977) *cert. denied*, 434 U.S. 938 (1977). *But see S.A.F.E. Export Corp.*, ASBCA Nos. 26880, 26906, 84-1 BCA ¶ 17,126 at 85,803 (1983) (board cited *Discount* test; however, it also commented that the government was required to prove "the contractor was in fact incapable of performing the contract").

[234]554 F.2d 435, 213 Ct. Cl. 567 (1977) *cert. denied*, 434 U.S. 938 (1977).

[235]*Id.* at 439, 213 Ct. Cl. at 572. When no substantial work was accomplished for several weeks, the government had issued a 10 day cure notice demanding that work be resumed to ensure timely completion.

[236]*Id.* at 441, 213 Ct. Cl. at 575.

court declined to require the government to show that timely completion was impossible.[237]

This test was refined in *Lisbon Contractors, Inc. v. United States*,[238] where the Federal Circuit agreed that absolute impossibility of performance was not required to sustain a failure to make progress.[239] Accordingly, the court explained that the default clause required the government to carry the burden of proving "a reasonable belief on the part of the contracting officer that there was 'no reasonable likelihood that the [contractor] could perform the entire contract effort within the time remaining for contract performance.'"[240] Noting that the contracting officer failed to determine whether the contractor could have completed the project on time, the court upheld the Claims Court's finding that Lisbon had submitted a revised schedule showing how the project would be timely completed.[241] The court ruled that the default termination was properly converted to one for the convenience of the government.[242] Thus, the contracting officer's objective belief

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[237]*Id.*, 213 Ct. Cl. at 575.

[238]828 F.2d 759 (Fed. Cir. 1987).

[239]*Id.* at 765.

[240]*Id.* (quoting RFI Shield-Rooms, ASBCA Nos. 17374, 17991, 77-2 BCA ¶ 12,714 at 61,735).

[241]*Id.* at 766.

[242]*Id.* at 767.

is the key to the inquiry.[243] Furthermore, the ASBCA has held that the government must adduce "convincing proof" that timely performance is beyond the contractor's reach.[244]

The government argued in *Lisbon Contractors* that the termination was justified because the contracting officer had reasonable doubts concerning Lisbon's timely completion.[245] The government cited *Discount* in arguing that despite the contracting officer's failure to evaluate the contractor's ability to meet the contract date, Lisbon failed to give the contracting officer reasonable assurances of its ability to complete the job on time. The Federal Circuit apparently accepted this characterization of *Discount* when it declined to directly reject this assertion and discussed the steps that Lisbon had taken to adequately assure the contracting officer.

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[243]In a pre-*Lisbon* case, the ASBCA ruled that a contracting officer's reasonable belief that timely performance is beyond the contractor's capabilities is not enough to sustain a default termination. Southwest Marine, Inc. San Pedro Div., ASBCA No. 28196, 86-2 BCA ¶ 19,005. In that case, the government contracted for overhaul and modification of a ship. The dry dock suffered damage in a storm entitling the contractor to two extra days for performance. The government terminated for default arguing that it reasonably believed that the contractor could not complete on time. The board rejected the government's assessment that the contractor was hopelessly behind on one item and had less than 100% probability of completing four other sets of requirements. The board also was not convinced that miscellaneous performance deficiencies were sufficient to sustain default termination, describing them as routine problems every contractor experiences. The board, thus, evaluated all the facts and substituted its own judgment whether timely performance was within reach.

[244]Southwest Marine, Inc. San Pedro Div., ASBCA No. 28196, 86-2 BCA ¶ 19,005 at 95,983 (quoting Norfolk Air Conditioning Serv. and Equip. Corp., ASBCA Nos. 14080, 14244, 71-1 BCA ¶ 8617).

[245]828 F.2d at 766.

Apparently, a contractor with a plan for timely completion bears the responsibility of convincing the contracting officer that the proffered solution will succeed.

Both *Lisbon Contractors* and *Discount*, discussed above, involved construction contracts; nonetheless, the test is applicable to supply and service contracts.[246] For example, the ASBCA in *DBA Systems, Inc.*,[247] cited *Lisbon Contractors* in explaining that a default termination for failure to make progress in a supply contract would be appropriate where there is no reasonable likelihood of performance within the time remaining. In *Mike Horstman*,[248] the AGBCA applied the same test, holding that after only two days of a 20 day contract for tree planting services had elapsed, the contractor's effort to obtain a larger work force and secure a loan, militated against the government's assessment that timely completion could not be reasonably assured.[249]

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[246]For other construction cases applying the test, *see, e.g.*, Maitland Bros. Co., ASBCA Nos. 30089 *et al.*, 90-1 BCA ¶ 22,367 (citing *Lisbon Contractors*); Ener-Tech Automated Control Sys., Inc., ASBCA No. 31527, 89-3 BCA ¶ 22,091 (citing *Lisbon Contractors*); J.F. Whalen and Co., AGBCA Nos. 83-160-1, 83-281-1, 88-3 BCA ¶ 21,066 (citing *Discount*).

[247]ASBCA No. 34664, 89-1 BCA ¶ 21,465.

[248]AGBCA Nos. 87-388-1, 87-405-1, 89-2 BCA ¶ 21,752.

[249]*Id.* at 109,453, *see* Arthur L. Cruz, IBCA No. 2098, 87-3 BCA ¶ 21,142 (services case citing *Discount*).

C. Analysis of Endangered Performance

(1) Percentage of Completion Test

The boards have used an analysis of the percentage of completion compared to the percentage of time remaining.[250] For example, in *TMI, Inc.*,[251] the ENG BCA held that a contract 4% complete after 70% of the allotted time had elapsed "demonstrated there was *no* reasonable likelihood that the Contractor could have performed the entire contract within the time remaining."[252] Thus, when a contractor is behind schedule without a reasonable strategy to recover, the contract may be properly terminated for default.[253] Conversely, when the

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[250]*See e.g.*, J.F. Whalen and Co. AGBCA Nos. 83-160-1, 83-281-1, 88-3 BCA ¶ 21,066 at 106,386 ("[w]e have sustained a termination for default where the percentage of work completed versus the percentage of time expended indicated that [the contractor] was not likely to complete on time") (service contract); Arthur L. Cruz, IBCA No. 2098, 87-3 BCA ¶ 20,142 at 101,947 ("it is well established that defaults will be sustained where predicated on a percentage of completion versus percentage of time expended basis, where timely completion was improbable") (service contract).

[251]ENG BCA No. 5524, 89-3 BCA ¶ 22,029 (construction contract to rehabilitate slide gates on dam).

[252]*Id.* at 110,800-01 (emphasis in original).

[253]*See e.g.*, Arthur L. Cruz, IBCA No. 2098, 87-3 BCA ¶ 20,142 (proper termination when 9% of work in 53% of time); Ulibarri Constr. Co., VABCA Nos. 1780, 1784, 87-3 BCA ¶ 20,169 (proper termination when 45% of work in 95% of time); Dave's Aluminum Siding, Inc., ASBCA No. 29397, 86-1 BCA ¶ 18,623 (proper termination when 8% of work in 67% of time); Frank Kuehl, AGBCA No. 83-161-1, 84-1 BCA ¶ 17,024 (proper termination when 13% of work in 64% of time); Ohnstad Constr., Inc., AGBCA No. 81-160-1, 83-1 BCA ¶ 16,144 (proper termination when 4% of work in 54% of time); RFI Shield-Rooms, ASBCA Nos. 17374, 17991, 77-2 BCA ¶ 12,714 (proper termination when 15% of work in 84% of time).

contractor is on or ahead of schedule, termination for failure to progress is improper.[254] Furthermore, a contractor with a feasible plan to improve performance may overcome a default termination, despite a disparity in the amount of work completed versus the amount of time elapsed.[255] The AGBCA in *Arrowhead Starr Co.*,[256] determined that the contractor had completed 42% of the work in 66% of the contractually allowed time, but could have timely completed the contract to plant seedlings by hiring more workers. Nonetheless, the board upheld the termination because the evidence failed to show that the contractor intended to accelerate progress. Thus, the cases reveal that the boards will not necessarily rely solely on the percentage of completion analysis, but will evaluate all circumstances surrounding a termination.[257] The ASBCA noted in *Southwest Marine, Inc. San*

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[254]Southwest Marine, Inc. San Pedro Div., ASBCA No. 28196, 86-2 BCA ¶ 19,005 (65% of work complete in 65% of time); *see* Mishara Constr. Co., ASBCA No. 8604, 1964 BCA ¶ 4345 (60% of work complete in less than 50% of time).

[255]*See* Frank Kuehl, AGBCA No. 83-161-1, 84-1 BCA ¶ 17,024 at 84,778, where the board noted that if the contractor had hired one more laborer or worked longer hours, timely completion would have been possible. However, the contractor had offered no such plan but had in fact submitted a progress schedule indicating more meager manning. *Cf.* TMI, Inc., ENG BCA No. 5524, 89-3 BCA ¶ 22,029 at 110,801 ("[c]ontractor demonstrated no practical capability to *meet* its theoretical and extremely optimistic schedule") (emphasis in original); Techcraft Systems, VABCA Nos. 1894 *et al.*, 86-3 BCA ¶ 19,320 ("[w]hile it is conceivable that a contractor might be able to accelerate its performance to overcome a loss of time at the beginning of a project, it is by no means certain;" contractor's past poor performance provided no reason to believe substantial improvement was possible).

[256]AGBCA No. 81-236-1, 83-1 BCA ¶ 16,320.

[257]*See* TMI, Inc., ENG BCA No. 5524, 89-3 BCA ¶ 22,029 (board considered percentage of completion as well as the contractor's lack of diligence, expertise, supervision, resources, and management); Dave's Aluminum Siding,

Pedro Div.,[258] that its determination did not rest solely on its findings of the percentages of completion, but also "upon a detailed review of the work done and to be done."[259]

(2) Totality of Circumstances

When the contract is not readily susceptible to percentage of completion evaluation, the boards measure progress failures on the basis of the significance of the deficiency and its impact upon the contractor's ability to perform on time. For example, in *Techcraft Systems*,[260] the VABCA sustained a default termination when a contractor's failure to submit acceptable submittals for a diesel engine made timely completion highly doubtful.[261] The contractor was required to supply and install an emergency generator. Techcraft initially took 30 days to provide a submittal that was rejected for failure to meet required power specifications. It took another 30 days to provide another submittal which was rejected for the same

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Inc., ASBCA No. 29397, 86-1 BCA ¶ 18,623 (board considered percentage of completion as well as poor quality of prior performance).

[258]ASBCA No. 28196, 86-2 BCA ¶ 19,005.

[259]*Id.* at 95,984.

[260]VABCA Nos. 1894 *et al.*, 86-3 BCA ¶ 19,320.

[261]*Accord*, Star Painting & Contracting Co., VABCA No. 1982, 85-3 BCA ¶ 18,393 at 92,262 ("[b]ecause of the Contractor's failure to provide timely submittals, he could not possibly complete the contract within the specified time.").

reason. The board reviewed the contractor's progress chart in finding that even if a hasty resubmittal were approved, the time for completion could not have been met. The board noted that acceleration was possible; however, the contractor's lack of speed in the submittal process provided the contracting officer little confidence in such a solution. The board found the contractor's lack of diligence dispositive; hence, "[w]ithout an approved submittal, the CO had no way to realistically gauge when, if ever, this particular Contractor might be in a position to complete the contract."[262] In contrast, the ASBCA in *Ener-Tech Automated Control Systems, Inc.*,[263] reversed a default termination despite a late and defective submittal. The board found that timely completion was within the contractor's technical capability despite the late start. Although the contractor failed to give the government a "positive assurance...that the completion date could be met," the board declined to hold that such lack of assurance validated the termination.[264] Thus, the fact of a late or defective submittal is but a step in the analysis. The ultimate question is whether the contractor is reasonably likely to complete the contract on

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[262]VABCA Nos. 1894 *et al.*, 86-3 BCA ¶ 19,320 at 97,710.

[263]ASBCA No. 31527, 89-3 BCA ¶ 22,091.

[264]*Id.* at 111,095.

time.[265]

(3) Missed Milestones

Occasionally, boards will sustain a termination for default without expressly evaluating the impact of the progress failure on the ultimate performance date. For example, when the contract includes progress milestones such as the delivery of test reports, test plans, or preproduction samples, the boards have sustained default terminations for failure to deliver these items, provided the government has issued a cure notice and has not received reasonable assurances. In *Ubique Ltd.*,[266] a contract for provision of radar control modular consoles included a delivery date of 14 February 1971 for a prototype. When the prototype was not delivered on the 14th, the government had no right to default terminate for delivery failure because the prototype was not an end item that triggered the default clause. Therefore, the government waited to see what the contractor would do. An inspection by a government quality control representative on 4 March disclosed that virtually no work had been done since the previous inspection on 4 February. In response to a cure notice, the contractor did not adequately

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[265] The ASBCA has also overturned a default termination based upon a contractor's failure to timely pay a subcontractor's invoices. Human Resources Mgt., Inc., ASBCA Nos. 27297, 27561, 83-1 BCA ¶ 16,526. When the contract was terminated, the subcontractor had ceased performance; however, the contractor had several options to obtain the disputed services.

[266] DOT CAB Nos. 71-28, 71-28A, 72-1 BCA ¶ 9340.

explain its failure to progress; therefore, the board upheld the termination for default. Implicit in the holding was the notion that the failure to deliver the prototype indicated a lack of ability to deliver the production items.

In *Allied Technology, Inc.*,[267] the contractor's failure to submit an adequate test plan after being notified of deficiencies in its first submittal, sustained default termination for failure to progress. Through its conduct, the government had waived the first article due date; therefore, the board made no evaluation of the contractor's ability to timely complete the contract. Nonetheless, the board ruled that failure to submit the plan supported the termination. It apparently treated the failure as analogous to delivery failure. Therefore, the contractor's failure to cure the problem within the cure period, was a sufficient basis to terminate the contract.

The missed milestone must be a critical link in completion of the contract in order to sustain a termination. In *Patty Precision Prods. Co.*,[268] the board considered the contractor's failure to meet a single milestone: preparation of samples for the first increment of bomb racks to be delivered under the contract. The board rejected the contractor's assertion that missing a single milestone would not sustain a default termination. The board noted that the contractor was issued a

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[267]ASBCA Nos. 18101, 18439, 74-1 BCA ¶ 10,621.

[268]ASBCA No. 24458, 83-1 BCA ¶ 16,261.

cure notice and that the contractor's excuses for its failure were not compelling. Therefore, when the government ascertained that no bomb racks had been completed and the cure response provided no plan for correcting the default, the termination was sustained.

(4) Summary

The government bears the burden of proving its assessment of failure to progress by convincing proof. It may do so by showing the percentage of completion is significantly behind the percentage of time elapsed. Additionally, poor quality of performance will bolster the government's case. The government will prevail unless the contractor demonstrates that it had provided the government with a reasonable plan to improve performance and meet the deadline.[269] When the contractor's failure may be evaluated as a missed milestone, the inquiry focuses upon the criticality of the milestone, the impact on timely performance, and the contractor's response to the cure notice. The key is the contractor's response.[270] If it does

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[269]*See* Multi-Roof Systems, Co., ASBCA No. 26464, 84-3 BCA ¶ 17,529 at 87,298 ("[w]here there is a demonstrated lack of diligence and the contracting officer has ample grounds for believing that performance of the contract is endangered, and the contractor has no realistic plan to cure the default, termination for default for failure to make adequate progress is proper").

[270]In Patty Precision Prods. Co., ASBCA No. 24458, 83-1 BCA ¶ 16,261 at 80,812, the board commented on the cure notice:

not provide a reasonable plan to rectify the progress failure, then the default will be sustained.

D. Anticipatory Repudiation

(1) Roots of the Doctrine

Anticipatory repudiation is another basis for default termination prior to expiration of the time for contract performance. The ASBCA set forth the analytical framework for anticipatory repudiation in *Fairfield Scientific Corp.*:

> The hallmark of anticipatory repudiation is that there must be "a definite and unequivocal manifestation of intention on the part of the repudiator that he will not render the promised performance when the time fixed for it in the contract arrives."[271]

Anticipatory repudiation is not specifically mentioned in the standard default clauses; nonetheless, the doctrine has been widely applied. The boards have accepted the rule without a thorough analysis of whether it has its roots in the default

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> One obvious purpose of the cure letter is to elicit from the contractor information as to what must be done to solve the lack of progress and how long it will take. Having failed to furnish the requested information, it ill behooves the [contractor] to fault the contracting officer for not having it. In other words, if [the contractor] had a reasonable plan for effecting a cure for its lack of progress, it was obligated to come forward with it or risk the contracting officer drawing the logical inference that it had no such plan.

[271]ASBCA No. 21151, 78-1 BCA ¶ 13,082 at 63,908 (quoting CORBIN ON CONTRACTS § 973).

clause.[272] The ASBCA has noted that paragraph (a)(1)(ii) of the default clause "extends somewhat beyond the right to terminate an executory contract for [anticipatory repudiation], and gives the Government the right to terminate if the contractor 'so fails to make progress as to endanger performance of this contract in accordance with its terms.'"[273] The board went on to note that the 10-day cure notice was not applicable because anticipatory repudiation is a total breach of contract creating an immediate right of action.[274] The ASBCA more fully explained this rationale in *Mission Valve and Pump Co. a Div. of Mission Mfg. Co.*,[275] stating

> [W]henever there is a positive, definite, unconditional, and unequivocal manifestation of intent, by words or conduct, on the part of a contractor of his intent not to render the promised performance when the time fixed therefor by the contract shall arrive, the contracting officer is not

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[272]*See* Norfolk Air Conditioning Serv. and Equip. Corp., ASBCA Nos. 14080, 14244, 71-1 BCA ¶ 8617 at 40,053, where the board noted that a contract may be terminated before the performance date on only two bases: "i) failure to make progress endangering contract performance, and ii) repudiation of the contract." The board further stated that "[t]ermination prior to the contract performance date without a cure notice on the ground of contract repudiation by the contractor requires clear and unmistakable evidence of a refusal or inability to perform." Obviously, the board would not have discussed the exception to the cure notice requirement if it were not basing anticipatory repudiation on that specific clause.

[273]Fairfield Scientific Corp., ASBCA No. 21151, 78-1 BCA ¶ 13,082 at 63,906.

[274]*Id.* at 63,907; *accord*, Nation-Wide Reporting and Convention Coverage, GSBCA No. 8309, 88-2 BCA ¶ 20,521 at 103,741 ("cure notice was neither provided nor required"); Saber Ridge Farms, IBCA No. 1738-11-83, 85-3 BCA ¶ 18,201 at 91,366 (cure "notice was unnecessary in this case, because the default termination was based on an anticipatory breach").

[275]ASBCA Nos. 13552, 13821, 69-2 BCA ¶ 8010 at 37,243.

> required to go through the useless motions of issuing a preliminary "10-day cure" notice even though the time for performance has not yet arrived, but may terminate the contract forthwith on the ground of anticipatory breach.[276]

Nonetheless, the ASBCA has recently categorized anticipatory repudiation as a remedy not specifically enumerated in the default clause, but included in the general right to exercise other remedies as provided by law.[277] The board also considered a contractor's failure to provide adequate assurances as another distinct ground for default.[278] The better view is that anticipatory repudiation is not a subset of progress failure. To carve out an exception to the cure notice requirement is to acknowledge that the progress failure clause is inapplicable. Even if the foundation of anticipatory repudiation is the progress failure clause, the consequences are the same because the boards do not require cure notices.

(2) Proof Requirements

The evidence required to sustain a termination prior to the performance date, without a cure notice must be a "clear and

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[276]This excerpt was cited with approval by the Federal Circuit in Cascade Pacific Int'l v. United States, 773 F.2d 287, 293 (Fed. Cir. 1985).

[277]National Union Fire Ins. Co., ASBCA No. 34744, 90-1 BCA ¶ 22,266.

[278]*Id.* at 111,856 (citing the RESTATEMENT (SECOND) CONTRACTS § 251 and U.C.C. § 2-609).

unmistakable" refusal or inability to perform.[279] The default termination remedy for anticipatory repudiation may be invoked whenever the contractor manifests an intention not to proceed with the contract.[280] Nonetheless, when the contract is not terminated until after the performance date has passed, the default should be analyzed in terms of delivery failure rather than anticipatory repudiation. When the contractor has not been afforded the contractually bargained-for performance period, then the government must bear the heavy burden of proving "an unequivocal manifestation" of intent not to complete the contract.[281] However, when the contractor has had the full benefit of the contract period, that heavy burden is not appropriate.[282]

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[279]Norfolk Air Conditioning Serv. and Equip. Corp., ASBCA Nos. 14080, 14244, 71-1 BCA ¶ 8617 at 40,053.

[280]Professors Nash and Cibinic note that the rule has been applied "before issuance of a notice to proceed; prior to the date services were to begin; before any attempted performance had begun; after due date where no 'waiver of due date' has occurred; where 9 months passed after due date had been 'waived' but no new due date had been set; and where the Government had expressly allowed a delinquent contractor to continue after due date." J. CIBINIC, JR. & R. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 718 (2d ed. 2d printing 1986) (citations omitted). *See* K C Dodge, Inc., PSBCA No. 1748, 88-3 BCA ¶ 20,947 (contract properly terminated two months before delivery date when contractor informed government of its inability to deliver required vehicles due to "early model close-out"); Nation-Wide Reporting and Convention Coverage, GSBCA No. 8309, 88-2 BCA ¶ 21,521 (contractor repudiated contract to provide reporting services starting on 1 March 1985 by letter of 5 February 1985).

[281]L.O. Warner, Inc. EBCA No. 351-2-86, 88-2 BCA ¶ 20,596.

[282]*Id.* When the full performance period has elapsed, the right to terminate for delivery failure may be applicable unless the government has waived the due date.

(3) Boundaries of the Doctrine

Examination of what is not anticipatory repudiation provides insight into the boundaries of the doctrine. In *Fairfield Scientific Corp.*,[283] the ASBCA distinguished abandonment from anticipatory repudiation, noting that abandonment did not entail notification to the government. The board, therefore, ruled that the contractor's curtailment of performance did not establish repudiation when the contractor never informed the government of its intentions. Thus, the government's failure to issue a cure notice was fatal to the default termination. Furthermore, the board declined to permit the government to establish through "hindsight that the cure notice may have been useless."[284]

When a contractor's conduct or speech evinces a willingness to attempt completion, termination is inappropriate. In *Alta Constr. Co.*,[285] the contractor questioned the validity of the contract, but executed bonds and communicated its intention of performing. The board sustained the appeal, ruling that the contractor had not unequivocally manifested an intention not to perform the contract. One board has ruled that an unconditional manifestation of intent not to perform is required to prove

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[283]ASBCA No. 21151, 78-1 BCA ¶ 13,082.

[284]*Id.* at 63,910.

[285]PSBCA No. 1463, 90-1 BCA ¶ 22,527.

anticipatory breach.[286] Thus, where the contractor did not abandon the contract, but conditioned performance on provision of releases or clarifications, the default termination was improper. In *Sutton Oil Co.*,[287] the contractor failed to deliver fuel but informed the government that it was seeking another source of supply. The board ruled that anticipatory repudiation was inapplicable.[288] These cases disclose that any hint of possible resolutions for nonperformance will protect the contractor from anticipatory repudiation. The government, however, is not without recourse because it may terminate for progress failure when successful completion is in jeopardy. The following discussion examines different instances of anticipatory repudiation.

(a) Express Refusal to Perform

The simplest example of anticipatory repudiation is the contractor's express refusal to perform the contract. A common scenario occurs when the contractor threatens to stop work until a dispute is resolved in its favor. For example, in *AGH Indus.*,

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[286]James W. Sprayberry Constr., IBCA No. 2130, 87-1 BCA ¶ 19,645.

[287]ASBCA No. 33348, 88-3 BCA ¶ 21,158.

[288]*Id.*; *see* Composites Horizons, ASBCA Nos. 25529, 26471, 85-2 BCA ¶ 18,059 (contractor needed price adjustment to avoid being forced out of business; however, contractor stated intention of continuing performance).

Inc.,[289] the contractor refused to proceed on the contract until the government favorably decided its claims for delays and changes. The ASBCA upheld the termination noting that the Disputes clause required the contractor to continue performance even if the contractor's interpretation of the requirements were correct.[290] In that contract for the supply of helicopter skid shoes and skid tube assemblies, the price of raw materials had increased substantially; however, the contract did not include an economic price adjustment clause. The contractor assumed the risk of those price increases; therefore, the risk of bankruptcy was not an excuse for nonperformance. Thus, refusal to perform, pending favorable resolution of disputes will sustain a default termination.[291]

Anticipatory repudiation is clear when the contractor stops

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[289]ASBCA Nos. 25848, 26535, 85-1 BCA ¶ 17,784.

[290]The contractor's duty to proceed will be discussed more fully in the next chapter.

[291]*See* Harland Jones & R. Jackie Bowen, Contractors, IBCA No. 2444, 89-2 BCA ¶ 21,793 (default termination sustained when contractor returned government furnished material and refused to continue performance when alleged differing site conditions made fence construction harder than anticipated); Sealtite Corp., GSBCA Nos. 7458, 7633, 88-3 BCA ¶ 21,084 (default termination sustained when contractor refused to perform unless change order issued); Fox & Ginn Moving & Storage Co., ASBCA No. 31100, 86-3 BCA ¶ 19,300 (default termination sustained when contractor refused to perform household goods contract because government withheld monies for substandard work); Zamora Constr. Co., ASBCA No. 28174, 86-2 BCA ¶ 18,952 (default termination sustained when contractor refused to install and repair fencing without price increase, because bid had failed to account for supply of certain materials).

performance. The board in *Lawrence D. Bane,*[292] sustained a default termination when the contractor stopped performance of his mail transportation contract after a request for a price increase was rejected. Similarly, in *Michael N. Beckloff,*[293] the contractor stopped transporting mail when his pay was garnished under state court order. The PSBCA upheld the termination because the contractor could present no excuse for his nonperformance. When the contractor in *Hilltop Gun & Saw Shop,*[294] stopped performance of its forest thinning contract because of alleged over-inspection, the AGBCA upheld the termination. The IBCA held that the contractor in *Timberland Management*[295] had anticipatorily repudiated its contract when the company owner stated that he would finish a specific area under the contract for roadway maintenance, but would then "call it quits." When the contractor has expressly repudiated the contract, the government has a summary right to terminate the contract for default; however, the contractor may prove that its failure was excusable or caused by a government material

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[292]GSBCA Nos. 1440, 1491, 86-2 BCA ¶ 18,997; *see* Tim Muir, AGBCA No. 87-256-1, 89-2 BCA ¶ 20,625 (default termination sustained when contractor abandoned contract due to alleged financial inability to continue).

[293]PSBCA No. 2249, 89-2 BCA ¶21,767.

[294]AGBCA No. 81-183-1, 85-2 BCA ¶ 18,107.

[295]IBCA No. 1877, 85-3 BCA ¶ 18,276.

breach.[296]

(b) Express Statement of Inability to Perform

When the contractor manifests an inability to perform the contract, the government need not wait until the performance date to see whether the contractor might succeed or not. The government may terminate the contract immediately for anticipatory repudiation. For example, when a contractor wrote the government relating its inability to deliver contractually required trucks, the PSBCA, in *K C Dodge, Inc.*,[297] upheld the termination two months before the delivery date. In *Total Terrain Contractors*,[298] the contractor admitted that it was too inexperienced to complete the tree thinning contract; therefore, the AGBCA found that an anticipatory repudiation had occurred and upheld the termination. The reported cases are replete with instances of proper default terminations when contractors

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[296]DWS, Inc., ASBCA No. 33245, 87-3 BCA ¶ 19,960. *Accord*, Union Dev. Co., Ltd., ASBCA No. 33684, 89-2 BCA ¶ 21,582 ("[o]nce an anticipatory repudiation is proven, the burden shifts to the contractor to prove that its repudiation was excusable within the meaning of the default clause); Interstate Reforesters, Dale Whitley, AGBCA Nos. 87-374-3, 88-152-3, 89-1 BCA ¶ 21,375 (abandonment without excuse sustained default termination). Government material breach will be discussed in the next chapter.

[297]PSBCA No. 1748, 88-3 BCA ¶ 20,947.

[298]AGBCA No. 84-360-1, 86-2 BCA ¶ 18,805.

communicate an inability to perform.[299]

(c) Actions Indicating Inability to Perform

The government need not rely only on the written or spoken word, but may evaluate the contractor's demonstrated inability to perform. In *Coliseum Constr., Inc.*,[300] a contract for reroofing of several buildings was properly terminated for default. The ASBCA held that the contractor's poor performance resulting in leaks, and its lack of a supplier who could provide the 20-year warranty material required by the contract, "demonstrated a likelihood of inability [to] perform" its obligations and amounted to an anticipatory breach.[301] The ASBCA has upheld a default termination when a contractor refused to explicitly state that it was repudiating the contract. In *Mansfield Oil Co.*,[302] the contractor was informed that its response to government inquiries about future performance would

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[299]*See e.g.*, Union Dev. Co., Ltd., ASBCA No. 33684, 89-2 BCA ¶ 21,582 (termination for default proper when contractor stated that it could not perform additional work on contract to construct building because of "inability to generate financial support"); Collins Marine Corp., ASBCA No. 32683, 87-1 BCA ¶ 19,536 (default termination proper when contractor requested no cost settlement because contract execution would put it "into a less than financially prudent cash position;" government properly considered request an anticipatory repudiation); Sunox, Inc., ASBCA No. 30025, 85-2 BCA ¶ 18,077 (termination for default proper when contractor admitted that it could not comply with Buy American clause).

[300]ASBCA Nos. 35953 *et al.*, 89-1 BCA ¶ 21,484.

[301]*Id.* at 108,230.

[302]ASBCA No. 29964, 87-2 BCA ¶ 19,911.

be regarded as an anticipatory repudiation. Despite its refusal to explicitly repudiate the contract, the contractor failed to make one delivery and asserted that it would not make further deliveries. Noting that the contractor continued to perform other contracts to supply petroleum products on the open market, the board refused to overturn the default termination. In *Monaco Enterprises, Inc.*,[303] the contractor responded to the government's request for assurances about contract completion by submitting a 17-page reply asserting that the contract was complete. The board sustained the termination, holding that the response "could be perceived as manifesting an intention not to continue contract performance without either additional payments or renegotiation of the contract terms."[304]

(4) Retraction

When the government has acted upon a perceived anticipatory repudiation, the contractor may not retract it. The GSBCA has ruled that a contractor "could not retract its repudiation since GSA already considered that repudiation to be final."[305] In that case, the contractor's attempted retraction followed

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[303]ASBCA Nos. 27931, 28434, 89-2 BCA ¶ 21,799.

[304]*Id.* at 109,690; *see* Crown Welding, Inc., ASBCA No. 36107, 89-1 BCA ¶ 21,332 (contractor's failure to report to work demonstrated intention not to perform contract).

[305]Nation-Wide Reporting and Convention Coverage, GSBCA No. 8309, 88-2 BCA ¶ 20,521.

issuance of the termination. The IBCA has similarly ruled that an attempted recantation communicated after issuance of a default termination was ineffective.[306] The board ruled that it would not "require the CO in such circumstances to wait and see if the contractor was 'just kidding' about its declared repudiation."[307]

In a questionable case, the PSBCA held that the government lost its right to terminate when it initiated renegotiation procedures with the contractor.[308] The contractor had notified the government that she would not perform a mail transportation route after August 22, 1986. The government asked her what increase in price she needed to continue. She provided a figure on July 31st; however, the government issued a termination notice on August 5th, effective August 22d. The board ruled that the government's request had "instilled an expectation in the [contractor] that she would be able to continue to perform;" therefore, preemptory termination was improper.[309] It is difficult to fathom how the contractor was prejudiced by the government's request to provide a price for not breaching the contract. Unless such action was a retraction of the repudiation, the government's right to terminate should have

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[306]Sabre Ridge Farms, IBCA No. 1738-11-83, 85-3 BCA ¶ 18,201.

[307]*Id.* at 91,366.

[308]Willis Jay Daniel and Terri A. Daniel, PSBCA No. 1579, 87-2 BCA ¶ 19,829.

[309]*Id.* at 100,316.

been unaffected. This holding may discourage the government from trying to work with the contractor for fear of jeopardizing its right to terminate for default.

CHAPTER V

FAILURE TO COMPLY WITH THE DUTY TO PROCEED

A. Introduction

The Disputes Clause requires contractors to proceed with contract performance during the resolution of disputes over contract requirements.[310] The clause provides in pertinent part:

> (h) The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer.[311]

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[310]Duty to proceed controversies are obviously spawned by government dissatisfaction with contractor performance. By its very nomenclature, the duty to proceed will not be an issue unless the contractor is refusing to proceed in some manner. Similarly, in government withholding of progress payments, a fertile area for duty to proceed controversies, the withholding is normally triggered by some kind of unsatisfactory performance. Professors Nash and Cibinic point out that the right to terminate for failure to proceed should only arise when the default "would otherwise be justified based upon a failure to make progress or anticipatory repudiation." J. CIBINIC, JR. & R. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 705 (2d ed. 2d printing 1986). They also point out that repudiation is distinguishable because a failure to proceed may involve merely work stoppage, and not an intention to cease work entirely. However, it appears that when a contractor reaches an impasse causing it to stop work and the government deems that stoppage significant enough to terminate the contract, anticipatory repudiation logic will satisfactorily resolve the controversy.

[311]FAR 52.233-1. This clause has its roots in the Contract Disputes Act of 1978, 41 U.S.C. § 605(b). FAR 52.233-1 provides for an alternate clause requiring continued contractor performance not only during resolution of disputes arising under the contract but also during disputes relating to the contract. The Defense Department requires the clause to be inserted in contracts for procurement of major weapons systems. DFARS 33.013. Both DOD and NASA authorize use of the alternate clause when vital to national

Thus, the duty to proceed limits the contractor's right to suspend or abandon work during dispute resolution.[312] The VABCA noted in *Delfour, Inc.*,[313] that the "contractor's remedy when faced with a disputed requirement is not to cease work. If it is dissatisfied, it should proceed and file a claim for compensation."[314] The cases make clear that "a contractor may

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security. *Id.*; NASA FAR Supp. 18-33.104. Professors Nash and Cibinic point out that this clause may require continued performance in the face of government material breach "which would otherwise constitute ground for rescission or abandonment under contracts containing [the standard clause]." J. CIBINIC, JR. & R. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 704 (2d ed. 2d printing 1986).

[312]*See* Stoeckert v. United States, 391 F.2d 639, 183 Ct. Cl. 152 (1968) (termination proper when contractor refused to follow directive to remove and replace tile where adhesion was unsatisfactory; contractor had no right to condition performance on reimbursement and receipt of government directions on method of installation). In Atterton Painting & Constr., Inc., ASBCA No. 31471, 88-1 BCA ¶ 20,478 at 103,581, the board described the process in the simplest of terms:

> Under the contractual scheme in Federal Government contracts, it is the general rule that the contracting officer has the last word (pre-appeal, of course) and the contractor is bound to do as he/she says. If the contractor disagrees with the contracting officer, the contractor may institute an appeal. In the meantime, however, the contractor is legally bound to proceed diligently to perform the contract work in accordance with the views of the contracting officer. The contractor does not have the option of picking up its marbles and going home.

[313]VACAB Nos 2049 *et al.*, 89-1 BCA ¶ 21,394 at 107,856.

[314]The ASBCA described the rationale for the precursor to the present Disputes clause in Detroit Designing & Eng'r Co., ASBCA No. 8807, 1964 BCA ¶ 4214 at 20452:

> It was designed specifically to prevent interruption of contract performance--and in military contracts, to prevent disruption of orderly and necessary supply management functions and indeed, urgent military operations--during interminable and indefinite disputation. Regardless of the merits of a dispute, the plain provisions of the contract and the public interest do not for a moment permit us to countenance possible hampering of operations which might involve the lives of servicemen or the political

not condition its continued performance on the payment or partial payment of a claim."[315] The contractor's duty to proceed is not relieved by erroneous government interpretations of the contract.[316] Furthermore, the contractor must proceed

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position of the country in its myriad world-wide commitments and responsibilities. Yet, this might be the precise effect of prolonged suspension of contract performance even in connection with the most commonplace item of supply."

[315]DWS, Inc., ASBCA No. 33245, 87-3 BCA ¶ 19,960; *accord*, Roberts Constr. Co., ASBCA Nos. 35165, 35213, 89-1 BCA ¶ 21,420 at 107,951 ("when the contractor refuses to perform unless the Government complies with its claim demands, the Government has the right to summarily terminate the contract for default"); MCG Mach. Co. ASBCA No. 33029, 88-3 BCA ¶ 21,104 (contractor's refusal to proceed unless demands met justified termination); Brenner Metal Products, ASBCA No. 25294, 82-1 BCA ¶ 15,462 (contractor's refusal to proceed with performance unless demands met created right to summarily terminate).

[316]*See* Tectonics, PSBCA No. 2417, 89-3 BCA ¶ 22,119 at 111,238 ("[f]ailure to follow the Contracting Officer's direction constitutes an independent basis for termination of the contract, whether or not the Contracting Officer's interpretation of the contract obligations ultimately proves correct;" therefore, board went on to rule that the government's interpretation was not "so far outside the requirements of the contract as to have justified [the contractor's] refusal to comply"); Tree Best Reforesters, Inc., AGBCA Nos. 82-266-3, 82-267-3, 83-1 BCA ¶ 16,290 at 80,953 (even though the contractor's interpretation of the contract requirements was ultimately found to be correct, it was "duty bound to comply with the Government's instructions"); Pac-San Toilets, ASBCA No. 24426, 80-2 BCA ¶ 14,470 at 71,354 ("even though a contractor's interpretation of certain contract requirements may be correct, the contractor was still obligated to perform in accordance with the directions of the contracting officer and to seek relief in additional compensation under the appropriate contract provision;" thus, the board declined to decide whether the government's interpretation of the specifications was correct); Ganary Brothers, ASBCA No. 7779, 1963 BCA ¶ 3721 ("[i]f the contractor's interpretation were right and the Government's wrong, the contractor is still obligated to perform and to seek its relief in additional compensation under the Changes article"); *cf.* Schmid Plumbing & Heating Co. v. United States, 351 F.2d 651, 173 Ct. Cl. 302 (1965) (court intimated that if CO had issued termination for default for failure to follow his directive (albeit erroneous) to install boilers of a different make, termination would have been sustained).

despite erroneous government denial of liabilities.[317]

B. Exceptions to the Duty to Proceed

The duty to proceed is not absolute. The contractor may be excused where 1) the government has materially breached the contract, 2) it is impractical to proceed, and 3) the government has failed to provide clear directions.

(1) Government Material Breach

The common law principle relieving a contractor from performance when the other party has materially breached the contract applies to government contracts.[318] The ASBCA has

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[317]Accu-Met Prod., Inc., ASBCA No. 19704, 75-1 BCA ¶ 11,123 (incorrect government denial of responsibility for delays did not absolve contractor of duty to proceed); Mai Huu An Co., ASBCA No. 14953, 71-1 BCA ¶ 8874 (erroneous government denial of liability for increased austerity tax imposed by Republic of South Vietnam did not excuse refusal to perform).

[318]Malone v. United States, 849 F.2d 1441, 1445 (Fed. Cir. 1988) (contractor's "failure to perform would be excused and the termination for default would be improper if the government had materially breached the contract"). *See* Section 237 of the RESTATEMENT (SECOND) OF CONTRACTS (1981):

> It is a condition of each party's remaining duties to render performances to be exchanged under an exchange of promises that there be no uncured material failure by the other party to render any such performance due at an earlier time.

Professors Nash and Cibinic point out that the Disputes clause "severely limit[s] a contractor's ability to rely upon this doctrine by making many kinds of Government misconduct subject to resolution under the disputes procedures and specifically directing the contractor to proceed with the work pending resolution of such disputes." J. CIBINIC, JR. AND R. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 709 (2d ed. 2d printing 1986). Thus, for example, defects

stated that "where there has been a material breach of the contract by the Government, the contractor has a legal right of avoidance, thereby discharging his duty to perform, and relieving him of the default termination and the consequences which flow therefrom."[319] The GSBCA has described the exception as follows: "[a] party in antecedent material breach of one or more of its obligations under a bilateral contract may not exercise a contractually reserved right of default termination if the other party to the contract suspends its performance until that breach is cured."[320] Although any nonperformance, however slight, constitutes a breach, only a material breach will discharge the contractor from its duty to proceed.[321] What constitutes such a material breach commonly arises in cases involving progress or partial payments. The following discussion examines issues arising in government failure to make progress payments as well as other types of government breaches.

(a) Progress Payments

The most litigated controversy involving the duty to

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in specifications or inspection methods that are redressable under the Changes clause will not justify a failure to proceed. United States v. Utah Constr., 384 U.S. 391 (1965); Interstate Reforesters, Dale Whitley, AGBCA Nos. 87-374-3, 88-152-3, 89-1 BCA ¶ 21,375.

[319]Bogue Elec. Mfg. Co., ASBCA Nos. 25184, 29606, 86-2 BCA ¶ 18925.

[320]Drain-A-Way Systems, GSBCA No. 6473, 83-1 BCA ¶ 16,202.

[321]Consumers Oil Co., ASBCA No. 24172, 86-1 BCA ¶ 18,647.

proceed arises when a contractor claims material breach because the government has failed to make progress payments when due. The courts and boards are in general agreement that when government failure in this regard is wrongful and causes the contractor's default, the duty to proceed is excused.[322]

(i) Excusability v. Material Breach

The ASBCA distinguishes nonpayments resulting in excusable delays or defaults from nonpayments amounting to material breaches of contract.[323] The former category is rooted in paragraph (c) of the Default clause; thus, the analysis of government payment irregularities focuses upon the impact on the contractor. To be excusable, the contractor's default must have

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[322]TGC Contracting Corp. v. United States, 736 F.2d 1512, 1515 (Fed. Cir. 1984) (when contractor claims financial inability due to failure to receive progress payments, contractor must show both that the payments were erroneously withheld and the withholding "was the primary or controlling cause of the contractor's default"); George T. Johnson v. United States, 618 F.2d 751, 755, 223 Ct. Cl. 210, 217 (1980) ("inability to continue the work, as a result of financial incapacity caused by the Government's wrongful failure to make progress payments falls well within the scope of the exculpatory provision"); Consumers Oil Co., ASBCA No. 24172, 86-1 BCA ¶ 18,647 at 93,710 ("[i]t has long been settled that a contractor's performance delay or failure may be excused if the contractor was rendered financially incapable of continuing performance by the Government's failure to make partial or progress payments when due"). The contractor's right to abandon performance is not predicated on willful government withholding of payment. Inadvertent failure as well as administrative neglect will trigger the contractor's right.

[323]Consumers Oil Co., ASBCA No. 24172, 86-1 BCA ¶ 18,647. The DOT Board similarly has distinguished excusability under the Default clause for government caused financial incapacity from material breach for government failure to pay. General Dynamics Corp., DOT CAB No. 1232, 83-1 BCA ¶ 16,386.

been caused by the payment failure. For example, in *J.J. Bonavire Co.*,[324] the ASBCA refused to overturn a default termination when the contractor failed to show that the government's retainage of $4600 for liquidated damages (approximately $2600 more than permitted under the contract), contributed to its failure to properly complete the work.[325]

In analysis of material breaches, the focus is upon what the RESTATEMENT characterizes as "the extent to which the injured party will be deprived of the benefit which he reasonably expected."[326] The inquiry does not require impact on the

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[324]ASBCA Nos. 29846, 35078, 89-3 BCA ¶ 22,128.

[325]*See* Cosmic Constr. Co., ASBCA Nos. 24014, 24036, 88-2 BCA ¶ 20,622 (contractor failed to show that financial inability was caused by government failure to earlier pay equitable adjustment of $163,733; thus, default not excusable); Beekman Indus., Inc., ASBCA No. 30280, 87-3 BCA ¶ 20,118 (unpaid progress payment of $4,145 did not cause contractor's financial problems where the contractor needed an additional $50,000 to continue; hence, failure in performance not excused); Tri-Delta Corp., ASBCA No. 17456, 75-1 BCA ¶ 11,160 (default termination proper when contractor was insolvent; even if payment suspension had been improper, it did not cause financial collapse).

[326]RESTATEMENT (SECOND) OF CONTRACTS § 241 provides:

> In determining whether a failure to render or to offer performance is material, the following circumstances are significant:
>
> (a) the extent to which the injured party will be deprived of the benefit which he reasonable expected;
>
> (b) The extent to which the injured party can be adequately compensated for the part of that benefit which he will be deprived;
>
> (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
>
> (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the

contractor's ability to continue performance;[327] thus, financial incapability is a relevant, but not mandatory factor for application of the exception.

The line between excusability and material breach analysis is blurred. It is possible that a breach may be material but may not amount to an excuse under the Default clause. For example, in *Jones Plumbing & Heating, Inc.*,[328] the board noted that serious financial impact is an element to be considered in determining materiality, but it need not be present in all cases. Similarly, in *General Dynamics Corp.*,[329] the board found a material breach without mention of the financial impact on the contractor. On the other hand, it is difficult to conceive of a breach that is not material, yet significantly affects the contractor's ability to perform. A government nonpayment is a breach; therefore, if it does not trigger excusability due to lack of causation of financial incapacity, it should still be

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circumstances including any reasonable assurances;

(e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

[327]*See* Consumers Oil, ASBCA No. 24172, 86-1 BCA ¶ 18,647 at 93,711 ("[w]hen the Government breaches its duty to pay moneys undisputably owing, the contractor's right to abandon performance does not depend on showing that the delayed payment rendered it unable to continue").

[328]VABCA Nos. 1845, 1869, 86-1 BCA ¶ 18,659 at 93,857.

[329]DOT CAB No. 1232, 83-1 BCA ¶ 16,386.

analyzed for determination of materiality.[330]

(ii) Single Failure to Pay Does Not Automatically Excuse Contractor Nonperformance

In *Consumers Oil*, the ASBCA used expansive language in describing the foundations of the material breach exception. Judge Grossbaum cited several early Court of Claims cases for the proposition that "construction contractors are justified in refusing to proceed with performance upon the Government's failure to pay a single monthly progress payment when due."[331] Nonetheless, his inquiry did not stop there, for he went on to evaluate the government payment failures for materiality.[332] The VABCA in *Jones Plumbing & Heating, Inc.*,[333] reviewed the precedents and similarly concluded that "mere failure to make a

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[330]The cases do not necessarily follow this logic. *See Beekman Indus., Inc.* discussed at note 340 *infra*.

[331]*Id.* at 93,711 citing Brooklyn & Queens Screen Mfg. Co. v. United States, 97 Ct. Cl. 532 (1942); Suburban Contracting Co. v. United States, 76 Ct. Cl. 533 (1932); Overstreet v. United States, 55 Ct. Cl. 154 (1920); and Pigeon v. United States, 27 Ct. Cl. 167 (1892). These cases are described at note 349 *infra*.

[332]The contract in *Consumers Oil* required supply of gasoline to various military installations in the western United States. The board evaluated the contract as to each separate location to determine whether the government was in material breach. For George Air Force Base, it held that untimely payment, by 12-14 days, of two out of ten invoices was not material. At Long Beach Naval Shipyard, the government failure to timely (up to 40 days late) pay any of 38 invoices totalling nearly $163,000 was deemed material. At El Toro, the government failure to pay (for more than 90 days) invoices worth more than 17% of all supplies delivered was also deemed a material breach, especially in light of the fact that the cost to Consumers Oil had increased significantly.

[333]VABCA Nos. 1845, 1869, 86-1 BCA ¶ 18,659 at 93,857.

progress payment absent additional circumstances, will not, in and of itself, allow abandonment of a Government contract so as to excuse abandonment or refusal to perform."

The Court of Claims in *Northern Helix Co. v. United States*,[334] also stopped short of ruling that any failure to pay is a material breach, justifying a contractor's failure to perform. The court speculated that a "mere delay in payment, for a while, would not be a material breach but there is a clear distinction between delay of that kind and a total failure to pay over many months."[335] The government in that case owed the contractor over $8,500,000, which had accrued over twelve months; thus, the court had little trouble finding that "prolonged failure to pay large amounts was a material breach of the contract."[336]

There are several cases that appear to acknowledge a contractor's right to stop performance in the face of any government failure to pay. For example, in *DeKonty Corp.*,[337] the ASBCA evaluated a contract where the contractor had completed approximately $184,000 worth of work, but where the government had failed to pay $9,904 admittedly due. Although the board cited *Consumers Oil*, it did not discuss materiality,

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[334]455 F.2d 546, 197 Ct. Cl. 118 (1972).

[335]*Id.* at 550, 197 Ct. Cl. at 124-25.

[336]*Id.*

[337]ASBCA No. 32140, 89-2 BCA ¶ 21,586.

but conclusorily held that "non-payment of this undisputed balance was a material breach of the contract by the Government, entitling DeKonty to cease its own further performance without regard to whether the non-payment caused it to be financially unable to perform or not."[338]

The board appears to have made a giant leap from its comment about the irrelevance of financial inability[339] to the bald assertion that the payment failure was material. Even if causation of financial inability is not a prerequisite to material breach, not all breaches are material, and proper analysis requires that nonpayment be evaluated for materiality in the context of the entire situation. The result was probably correct because the board had found as a fact that DeKonty had abandoned the contract due to insolvency; thus, the inference was that the nonpayment had a major impact on performance. To the extent that *DeKonty* stands for the proposition that any progress payment failure will justify contractor nonperformance, the case does not comport with ASBCA precedent.[340]

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[338]*Id.* at 108,694. *See* DWS, Inc., ASBCA No. 33245, 87-3 BCA ¶ 19,960 at 101,050, where the board in *dicta* stated "if the Government unjustifiably fails to pay amounts undisputably [sic] due and owing under the contract, the contractor may declare the Government to be in breach of contract and stop its performance." The board ruled that the government had not breached the payment provisions.

[339]*See* discussion of requirement of causation of financial inability at note 323 and accompanying text *supra*.

[340]*Cf.* Beekman Indus., Inc., ASBCA No. 30280, 87-3 BCA ¶ 20,118 where the board considered the government's failure to pay $4,145 in progress payments admittedly due. The board did not discuss whether this amounted to a material breach, but decided that the contractor's need for cash arose before

In *R.H.J. Corp.*,[341] a case cited in *DeKonty*, the ASBCA ruled that the government's delinquency in making three progress payments was a material breach because the parties had contracted on the basis that progress payments would be the sole means of financing. The government's breach, thus, went to an essential part of the contractor's bargain. The ENG BCA in *H.E. & C.F. Blinne Contracting Co.*,[342] reversed a default termination of a contract to remove sunken vessels, where the government refused to make any progress payments for underwater cutting, comprising much of the work performed. Although the board's analysis was meager, it did note the importance of progress payments as a source of financing, particularly where the contractor was a small business with limited financial resources. This case may be interpreted to support the position that the sole basis justifying abandonment was the government failure to pay without regard to other factors; however, the better interpretation of the case is that the nonpayment was not the sole basis of the government's breach but was "one element in the totality of the circumstances."[343]

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the progress payment was withheld and, therefore, the failure to pay did not cause the financial problems. The board apparently used excusability analysis and did not go on to evaluate the materiality of the breach. A contractor would be well-advised to assert both avenues of appeal in every nonpayment controversy.

[341]ASBCA No. 9922, 66-1 BCA ¶ 5361.

[342]ENG BCA No. 4174, 83-1 BCA ¶ 16,388.

[343]This was the VABCA's interpretation in Jones Plumbing & Heating, Inc., VABCA Nos. 1845, 1869, 86-1 BCA ¶ 18,659 at 93,857.

(iii) Totality of Circumstances Test

In acknowledgment that the weight of authority recognizes that "[n]ot every breach discharges the injured party's remaining duties to render the performance it promised,"[344] the boards have used a totality of the circumstances test in analyzing whether a payment failure constitutes a material breach.[345] As the VABCA noted in *Monarch Enterprises, Inc.*,[346] "[n]on-payment is but one element which must be considered in determining whether a breach by the Government is sufficiently material to allow abandonment by a contractor."

In *Monarch* the contractor was paid only $350 of nearly $6000 earned. The government withheld the balance primarily because of a Department of Labor (DOL) investigation into the contractor's compliance with the Service Contract Act. Although the DOL had not mandated the withholding, the government did nothing to mitigate the adverse impact on the contractor. The board held that the withholding of four months pay was excessive and, therefore, a material breach.

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[344]Consumers Oil, ASBCA No. 24172, 86-1 BCA ¶ 18,647 at 93,713.

[345]The boards have not addressed the issue in terms of excusability under the Default clause. This approach should produce results consistent with the ASBCA because when government payment failure is a "controlling cause" of the contractor's performance failure, the nonpayment may properly be characterized as a material breach. *See* Jones Plumbing & Heating, Inc., VABCA Nos. 1845, 1869, 86-1 BCA ¶ 18,659 ("where the witholding [sic] puts a contractor in a position that it cannot pay employees or purchase needed material, then a material breach will be more readily established").

[346]VABCA Nos. 2239, 2296, 86-3 BCA ¶ 19,281 at 97,481.

The VABCA in *Jones Plumbing & Heating, Inc.*,[347] found no material breach where the CO withheld $2242 on a $20,000 contract because 1) the withholding lasted only two weeks, 2) it was based on an arguably valid reason, and 3) there was no evidence that the nonpayment prevented the contractor's performance.

The DOT Board in *General Dynamics Corp.*,[348] analyzed the nonpayment in context, stating:

> In summary, the cases have not established a clear standard to be followed in determining whether a breach is material so as to justify the non-breaching party calling an end to a contract. But it is evident that the amount of money involved, the length of time of the non-payment, and the payments procedure agreed to by the parties are significant factors to consider.

Thus, the government's failure to pay five invoices totalling $800,000 on a contract worth nearly $13 million was a material breach in view of the contract clause requiring payment of all allowable costs without exception. The board went on to rule that failure to pay $70,000 admittedly due on the first of those invoices would also have sustained the appeal.

The harder question is whether a nonpayment of $7000 or $700 would also have sustained the appeal. There should be some threshold of reasonableness that first must be crossed to get to material breach. It would be unreasonable to find the government in material breach for a proportionally minor failure in payment, unless that failure was the causative factor for the

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[347]VABCA Nos. 1845, 1869, 86-1 BCA ¶ 18,659.

[348]DOT CAB No. 1232, 83-1 BCA ¶ 16,386.

contractor's inability to perform.[349] For example, it would be ludicrous to allow a large contractor to halt performance on a $50 million contract, where the government's sole breach is failure to make a $5,000 progress payment. The better approach would be to analyze the failure in the context of the totality of the circumstances.

In summary, government failure to pay may excuse the contractor's default if the amount of the nonpayment is significant, the duration of nonpayment is lengthy, or the nonpayment causes the contractor's financial inability.

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[349] *Cf.* Brooklyn & Queens Screen Mfg. Co. v. United States, 97 Ct. Cl. 532 (1942) (termination improper where contractor abandoned performance on October 28th after government withheld September's progress payment for purely political reasons); Suburban Contracting Co. v. United States, 76 Ct. Cl. 533 (1932) (termination improper where contractor abandoned performance on January 11th after government refused to pay for December's work); Overstreet v. United States, 55 Ct. Cl. 154 (1920) (termination improper where contractor abandoned performance on July 8th after government failed to pay for work completed in May); and Pigeon v. United States, 27 Ct. Cl. 167 (1892) (termination improper where contractor abandoned performance on October 5th after government refused to pay for work completed in September).

In *Pigeon* and *Overstreet*, the court inferred that the lack of payments caused the contractor's failure in performance; however, *Suburban* and *Brooklyn & Queens* were not based upon adverse impact on the contractor's financial capabilities.

See also Contract Maintenance, Inc., ASBCA Nos. 19409, 19509, 75-1 BCA ¶ 11,207 (termination improper where contractor abandoned performance after government withheld four months of payments worth $15,000); Robert O. Redding, AGBCA No. 272, 69-2 BCA ¶ 7888 (termination improper where contractor abandoned performance on October 19 after the government withheld payment for approximately 30 days for work performed since the contract start date of September 16); Valley Contractors, ASBCA No. 9397, 1964 BCA ¶ 4071 (termination improper where contractor abandoned performance on August 8th, when government failed to pay for 51% of July's work admittedly performed); U.S. Services Corp., ASBCA Nos. 8291, 8433, 1963 BCA ¶ 3703 (termination improper where government caused contractor's insolvency when it improperly failed to pay for previous months services). Unlike the more recent cases, these earlier opinions do not delve deeply into the materiality of the government's breach.

(iv) Poor Performance Will Not Justify Nonpayment

When the contractor's performance is poor, the government must still make timely payments. The government may withhold payments only under the terms of the contract, such as the provision for retainage. Withholding an entire progress payment to motivate the contractor to improve performance is not acceptable. The government's remedy is to terminate for default; it cannot "waive the breach and insist on continued performance while at the same time refusing to make payment."[350] By the same token the contractor may not continue performance after a material breach by the government, needlessly running up damages.[351] If the contractor waives the breach and continues performance, it should notify the government of its reservation of the right to recover.[352] Conversely, the government may

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[350]Whited Co., VABCA No. 1604, 84-3 BCA ¶ 17,654 at 87,992; *accord*, Pigeon v. United States, 27 Ct. Cl. 167 (1892); General Dynamics Corp., DOT CAB No. 1232, 83-1 BCA ¶ 16,386; Drain-A-Way Systems, GSBCA No. 6473, 83-1 BCA ¶ 16,202.

[351]S.W. Electronics & Mfg. Corp., ASBCA Nos. 20698, 20860, 77-2 BCA ¶ 12,631 *aff'd* 655 F.2d 1078, 228 Ct. Cl. 333 (1978) (contractor could not continue production of useless item when it knew that specification was defective).

[352]Ling-Temco-Vought, Inc. v. United States, 475 F.2d 630, 201 Ct. Cl. 135 (1973) (contractor learned of alleged government breach yet continued performance, running up cost overruns; its failure to notify government of intent to assert claim deprived government of option of terminating the contract, so contractor recovery of costs denied); *see* Petroleum Terminal Mgt., Inc., ASBCA No. 33680, 89-2 BCA ¶ 21,835 (contractor waived its right to treat huge increase in fuel processed as material breach when it performed without objection for several months; it was not an excuse for default); G.W. Galloway Co., ASBCA No. 17463, 77-2 BCA ¶ 12,640 (contractor asserted that it would negotiate without waiving breach; hence, it retained right to assert

preserve its termination rights by providing the contractor notice of its reservations.[353]

(b) Other Material Breaches

Other government conduct in breach of the contract may also relieve the contractor of its duty to proceed.[354] Materiality of the breach should be determined by evaluation of the extent to which the contractor's bargain is impaired.[355] Thus, the contractor has been excused from performance in the face of government breaches such as provision of defective government furnished property,[356] unreasonable contract administration,[357]

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breach defense in opposition to termination).

[353]Olson Plumbing & Heating Co. v. United States, 602 F.2d 950, 221 Ct. Cl. 197 (1979).

[354]*See* United States v. Spearin, 248 U.S. 132 (1918) where the contractor was permitted to abandon work in the face of improper government repudiation of its duty to make the work site safe.

[355]*See* note 326 *supra*.

[356]In Bogue Elec. Mfg. Co., ASBCA Nos. 25184, 29606, 86-2 BCA ¶ 18925, the board ruled that the government materially breached the contract when it furnished defective engines leading to failures in performance, consequent suspension of progress payments, and ultimate termination for repudiation. Thus, the contractor's duty to proceed was extinguished by the defective government furnished property and its appeal of the termination was sustained.

[357]In Discovery Corp., ASBCA No. 36130, 89-1 BCA ¶ 21,189, *aff'd on reconsid.*, 89-1 BCA ¶ 21,403, the government's failure to approve or reject contractor submittals within the contractually required 45 day period, excused its failure to timely submit first article units. The government failed to respond to inquiries about the submittals and never informed the contractor of perceived problems. In Curtis L. Holt, HUD BCA No. 75-11, 76-2 BCA ¶ 11,999, the board ruled that a 12 day delay was not an unreasonable

creation of unsafe working conditions,[358] unreasonable inspection,[359] cardinal change,[360] and failure to deal in good

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period to process invoices. Nonetheless, the board overturned the termination because the "cumulative effect of lapses in Government administration of a contract may so hinder a contractor's performance as to excuse abandonment." *Id.* at 57,566. The government's failure to inform the contractor of deficiencies and failure to provide close supervision as required by the contract created the cumulative effect. In Brand S Roofing, ASBCA No. 24688, 82-1 BCA ¶ 15,513, the government committed a material breach of contract when it failed to timely object to the contractor's method of performance. The contractor's refusal to comply with government directives to reaccomplish the work according to government interpretations was justified because the government materially breached the contract by waiting three months to inform the contractor of its dissatisfaction. In G.W. Galloway Co., ASBCA Nos. 17436 *et al.*, 77-2 BCA ¶ 12,640, the board ruled that government failure to clarify defective specifications and insistence on economically impossible inspection standards justified contractor refusal to perform.

[358]In Estelle McCormick, PSBCA No. 1030, 83-2 BCA ¶ 16,574, the contractor was excused from performance when the Postal Service located mailboxes in a manner that made servicing of them unsafe.

[359]In Kahn Communications, Inc., ASBCA No. 27461, 86-3 BCA ¶ 19,249, the government's repeated failure to properly test in addition to its establishment of test procedures inconsistent with the specifications constituted a material breach and justified the contractor's refusal to proceed. In Puma Chemical Co., GSBCA No. 5254, 81-1 BCA ¶ 14,844, the contractor was excused from performance when the government failed to use contract specified test equipment and when the tests it did conduct yielded inconsistent results. *See* Edwards v. United States, 80 Ct. Cl. 118 (1934) where the contractor abandoned performance after a government inspector arbitrarily rejected hay for noncompliance with a subjective color standard. The hay was later accepted by the same inspector when the contractor sold the hay to another contractor who in turn tendered it to the government. The Court of Claims excused the contractor from continued performance.

[360]The Court of Claims in Allied Materials & Equip. Co. v. United States, 569 F.2d 562, 563-64, 215 Ct. Cl. 406, 409 (1978) noted that a cardinal change:

> [O]ccurs when the government effects an alteration in the work so drastic that it effectively requires the contractor to perform duties materially different from those originally bargained for. By definition, then a cardinal change is so profound that it is not redressable under the contract, and thus renders the government in breach.

faith.[361]

(2) Impractical to Proceed

When the contractor experiences extreme difficulty in continued performance, the duty to proceed will be relieved if the government caused the contractor's plight. For example, the previous section discussed the excusability of the contractor's failure to perform when government nonpayment caused the financial inability. When performance is impossible or commercially impractical, whether the result of government conduct or not, the duty to proceed is excused.[362]

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[361]Malone v. United States, 849 F.2d 1441 (Fed. Cir. 1988) (contractor's duty to perform excused when government misled contractor into continuing performance in accordance with a workmanship standard the CO later found unacceptable; court found breach of duty to deal in good faith and not hinder performance); *see* American Water Cooling Equip. Corp., GSBCA No. 9083-TD, 89-1 BCA ¶ 21,364 (government hindrance of contractor's performance by delaying start until winter, denying progress payments despite earlier promise to make payments, and establishing an impossible completion date, excused nonperformance). *But see* Michael N. Beckloff, PSBCA No. 2249, 89-2 BCA ¶ 21,767 (no material breach when government sent payment to state court in compliance with garnishment order; thus, termination proper when contractor abandoned performance); John S. Vayanos Contracting Co., GSBCA No. 2317, 89-1 BCA ¶ 21,494 (no government breach of duty of good faith and fair dealing where government failed to give guidance on source of water question because contract clearly obligated contractor to drill well).

[362]*See* International Business Aircraft, Inc., ASBCA No. 30904, 88-1 BCA ¶ 20,419 ("[i]t is recognized in Government contract law that, where contract performance becomes impossible without the fault or negligence of the contractor, the failure to perform is excusable;" however, contractor failed to show impossibility); Xplo Corp., DOT CAB Nos. 1289, 1458 86-3 BCA ¶ 19,125 (if increased cost and time "are of sufficient magnitude, and if the contractor has not assumed the risk of this unexpected event, then the contractor is excused from further contract performance notwithstanding the language of the 'Disputes' clause requiring continued performance;" costs and time amounting to twice the contract figures justified abandonment); Ned

Nevertheless, in such situations, the contractor must still request assistance or notify the government of possible specification deviations.[363] A contractor need not start work on portions of a contract that are not impossible when it knows that such performance will not further performance of contract as a whole,[364] or when the government has indicated that it would not accept partial performance.[365] Furthermore, the

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Hardy, AGBCA No. 74-111, 77-2 BCA ¶ 12,848 (no duty to proceed when government changed the conditions of the contract, denying contractor option of camping near work site; massive changes in planned performance and danger to people and property warranted refusal); Ryan Aeronautical Co., ASBCA No. 13366, 70-1 BCA ¶ 8287 (termination improper when contractor failed to meet performance specification that was technologically impossible). *See also* section B(1)(b) *supra* for cases where the contractor is excused for government caused performance failures; *see generally* R. NASH, JR., GOVERNMENT CONTRACT CHANGES Chapter 12 (1975 and Supp. 1981).

[363]Suffolk Environmental Magnetics, Inc. ASBCA No. 17593, 74-2 BCA ¶ 10,771 (specification impossible to perform, but contractor never informed government of difficulty; nonperformance not beyond contractor's control because government would have relaxed specification if asked); *see* Triax Co., ASBCA No. 33899, 88-3 BCA ¶ 20,830 ("where performance is impossible a contractor generally may not abandon performance unless the Government has been adequately informed of the problem and afforded an opportunity to relax the specifications"); The board in Dynalectron Corp., ASBCA No. 11766, 69-1 BCA ¶ 7595 at 35,276, described the rule:

> [O]nce a contractor knows, or should reasonably know, of the deficiency [in the specifications], a duty arises to notify the Government. Such notification enables the Government to evaluate the deficiency and to determine whether (a) to continue performance of the contract, and (b) if continued performance is deemed to be feasible, the most economic means of correction.

[364]Triax Co., ASBCA No. 33899, 88-3 BCA ¶ 20,830 (contract for housing renovation could not be performed by deadline if only 24 houses provided at a time; contractor had no duty to proceed with some renovation because the complexity of scheduling such a large renovation rendered partial performance impractical).

[365]Stamell Constr. Co., DOT CAB No. 68-27J, 75-1 BCA ¶ 11,334 (contractor refusal to work on other buildings excused when government refused to accept beneficial occupancy of them separate from hangar in controversy); *see* Ascani Constr. & Realty Co., VABCA Nos. 1572, 1584 83-2 BCA ¶ 16,635 (where

contractor will not be excused from performance failure if it has not assumed the risk of impossibility[366] or impracticability.[367]

When the contract completion is neither impracticable nor impossible, but the contractor knows that continued performance will result in a useless end product, the contractor has no duty to proceed, and in fact may be barred from recovering costs of correction if it does proceed without affording the government the option of providing directions.[368] Once the contractor

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contract required work to be completed in order without proceeding to next phase until prior phase complete, contractor had no duty to proceed on other phases without clear government direction).

[366]American Ship Building v. United States, 654 F.2d 75, 228 Ct. Cl. 220 (1981) (contractor knew contract was an advance in the state of the art; hence, it assumed the risk of failure); *see* J.A. Maurer, Inc. v. United States, 485 F.2d 588, 202 Ct. Cl. 813 (1973) (contractor had knowledge superior to government and entered contract with understanding of difficulty of task).

[367]*See* Ned C. Hardy, AGBCA No. 74-111, 77-2 BCA ¶ 12,848 (contractor had no duty to proceed where government changed conditions of performance, making performance markedly more expensive and dangerous when it barred contractor from camping near work site).

[368]*See* Delphi Indus., Inc., AGBCA No. 76-160-4 A and B, 84-1 BCA ¶ 17,053 at 84,907 (contractor "had a duty to first bring to the attention of the Government such major discrepancies or errors in the specifications or drawings;" thus, default termination was proper and contractor had to "suffer the consequences of his failure to make inquiry" when product was unsatisfactory); Robert Whalen Co., ASBCA No. 19720, 78-1 BCA ¶ 13,087 (delay costs recoverable when contractor refused to perform until defective design remedied); Seven Sciences, Inc., ASBCA No. 21079, 77-2 BCA ¶ 12,730 (no duty to proceed where the government breached the contract in providing defective design that would have resulted in unsatisfactory battery charger). In the context of a contractor suit to recover delay damages spawned by defective specifications, the Court of Claims noted that a contractor may not recover such damages if it knew or should have known of the defects based upon available information. J.D. Hedin Constr. Co. v. United States, 347 F.2d 235, 241, 171 Ct. Cl. 70, 77 (1965). The court observed that the contractor had "no right to make a useless thing and charge the customer for it." *Id.*,

informs the government of the alleged defective specification and suspends work for an appropriate period pending a response, it may continue to perform, and in fact, failure to perform may properly result in termination.

For example, in *Switlik Parachute Co. v. United States*,[369] the contractor suspended performance when it discovered an apparently defective design specification that would preclude it from meeting a performance specification requiring that a pistol holding closure strap be fastened over a pistol sample. The Court of Claims ruled that when the contractor had informed the government of the problem, it "had discharged its duty not to knowingly produce defective items without first contacting the [government]."[370] Thus, the contractor was not excused from its duty to proceed "in the absence of either an order...immediately to suspend production or of a change order modifying the design specifications."[371]

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171 Ct. Cl. at 77 (quoting R.M. Hollingshead Corp. V. United States, 111 F. Supp. 285, 286, 124 Ct. Cl. 681, 683 (1953)).

[369]573 F.2d 1228, 216 Ct. Cl. 362 (1978).

[370]*Id.* at 1235, 216 Ct. Cl. at 374.

[371]*Id.*, 216 Ct. Cl. at 374. The court went on to note, "[a]fter all, it is the defendant who warrants that compliance with its design specifications will result in an acceptable product." The court interpreted *Switlik* in a case where the contractor claimed damages for the cost of reworking radios that had been produced with a switch that did not operate properly despite meeting specifications. S.W. Electronics & Mfg. Corp. v. United States, 655 F.2d 1078, 228 Ct. Cl. 333 (1981). The contractor recovered for radios produced before the defect was discovered, but not for those produced after the government had instructed it to take specific corrective action. The court noted that *Switlik* stood for the proposition that "a contractor would be entitled to continue production of what the contractor believed were

In contrast, the contractor in *Pacific Devices, Inc.*,[372] stopped performance when, despite complying with specifications, its valves experienced leakage problems when put into operation. The government did not order work stoppage; however, the contractor feared that further production might lead to increased liability. The board ruled that the contractor had no duty to proceed when the government failed to respond to the contractor's request for clear directions on how to proceed. Thus, when it was correct in its assessment of the situation, the board excused the contractor of its duty to proceed.[373] Nonetheless, it appears that under *Switlik*, once it notified the government of the problem, the contractor could have continued performance and still have recovered under the contract.[374] Thus, absent clear government directives, continued performance may be the more prudent course, unless the contractor is absolutely sure that continued performance will result in unsatisfactory results or that a defective specification exists. When a contractor argued that its failure to perform was

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defective units, once the contractor had advised the Government of the problem and the Government had failed to take corrective action." *Id.* at 1085, 228 Ct. Cl. at 345.

[372]ASBCA No. 19379, 76-2 BCA ¶ 12,179.

[373]The contractor had proposed a solution to modify the valve to counter a back pressure problem, but never received a response. Unbeknownst to the contractor, the government had decided to alter the valve linkage to alleviate the back pressure problem without altering the contractor's valve.

[374]This approach properly puts the burden on the government to determine a course of action where its specifications have been questioned.

motivated by its opinion that the specifications would have resulted in unsatisfactory results, the GSBCA has ruled that the government was entitled to receive that for which it has contracted.[375] The board held that the government's clear direction to proceed militated against any justification of the contractor's nonperformance and sustained the termination.[376]

(3) Lack of Clear Direction

The government has a duty to administer contracts in good faith without hindering the contractor.[377] When the contractor encounters a problem requiring government instructions, its duty to proceed is suspended while it exercises its right to await clear direction.[378] The contractor may not prevail unless its requests for clarification are reasonable. For example, in

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[375]Sunsav, Inc., GSBCA Nos. 7523-COM, 7610-COM, 86-3 BCA ¶ 19,290.

[376]*Id.; see* Martin & Turner Supply Co., ASBCA No. 16809, 72-2 BCA ¶ 9610 (contractor's praiseworthy motive in refusing to supply item under specification, because it knew it interpreted specification differently from government did not justify nonperformance; if it met the specification, the government would have had to have accepted it, notwithstanding differences in interpretation).

[377]*See* note 361 *supra*.

[378]Kahaluu Constr. Co., ASBCA No. 31187, 89-1 BCA ¶ 21,308 (exception to duty to proceed is "where the Government has failed to give clarification to the specifications after a valid request from the contractor); *see* R. NASH, JR., GOVERNMENT CONTRACT CHANGES 567 (1975 and Supp. 1981) ("the right to *await clarification* of the specifications remains one of the major exceptions to the duty to proceed") (emphasis in original).

Color-Vue Electronics, Inc.,[379] the government's failure to provide technical information on circuitry did not justify nonperformance where the government had no duty to provide the information and it was available from the manufacturer. In *Electromagnetic Indus., Inc.*,[380] the board noted that the contractor "cannot, by continually writing letters requesting information and clarification, impose an obligation on the Government to answer every letter thereby postponing indefinitely the 'day of reckoning'--default termination."[381]

The contractor's right applies when the obstacle is defective specifications or differing site conditions. For example, in *James W. Sprayberry Constr.*,[382] a roofing contractor discovered the underlying roof was not level, rendering compliance with a specification impossible. The government failed to respond to repeated requests for clarification on how to comply with the specification after discovery of the uneven roof. The board found the default termination improper, ruling that Sprayberry had the "right to await clarification."[383] In

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[379]DOT BCA No. 1740, 88-1 BCA ¶ 20,482.

[380]ASBCA No. 11485, 67-2 BCA ¶ 6545 at 30,410.

[381]Nonetheless, the board held that Electromagnetic was prudent to attempt to get more information before "embarking on a futile" attempt to produce a third preproduction model.

[382]IBCA No. 2130, 87-1 BCA ¶ 19,645.

[383]*Id.* at 99,456. *See* Ascani Constr. & Realty Co., VABCA No. 1572, 83-2 BCA ¶ 16,635 (contractor had right to await clarification of plans when it discovered that floor would not support installation of sterilizer); Industrial-Denver Co., ASBCA No. 13735, 70-1 BCA ¶ 8118, (government rejected

Kahaluu Constr. Co.,[384] a painting contractor encountered unexpected delamination of existing undercoats. Tests revealed that the existing paint had been improperly applied, causing the delamination under pressurized water cleaning. When the contractor requested directions to proceed, the government directed the contractor to come up with a proposal, refusing to provide a solution or acknowledge responsibility. The board ruled that the government materially breached its duty to cooperate, thereby excusing the contractor's nonperformance pending resolution of the controversy.[385]

Even where specifications were not defective, a contractor has been excused from the duty to proceed. In *Pacific Devices, Inc.*,[386] the government brought the problem of leaking valve connections to the attention of the contractor, asking an opinion on what caused the problems. The contractor identified the problem as excessive back pressure caused by the valve hookup, and suggested changing its product specifications. However, the government decided to alter valve linkage in its

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proposed boiler, but failed to respond to a request to provide adequate design criteria to enable the contractor to decipher the meaning of "centrally located furnace;" board ruled that the contractor was excused from its duty to proceed).

[384]ASBCA No. 31187, 89-1 BCA ¶ 21,308.

[385]The board went on to note, "[i]n light of the lack of direction as to what the [government] wanted Kahaluu to do, and, with Kahuluu's repeated promise to proceed in accordance with the contract terms, we conclude that the termination based upon Kahaluu's failure to proceed as directed was not supportable." *Id.* at 107,466.

[386]ASBCA No. 19379, 76-2 BCA ¶ 12,179.

possession, rather than change the contract. Although the contractor's valves had met specifications and had previously been accepted, the contractor had ceased performance in fear of increasing its liability for defective valves. Although Pacific had requested clarifications, the government never informed it of its planned remedy; therefore, its nonperformance was excused and the termination was improper.[387]

When the contractor and government have been negotiating over the proper interpretation of contract performance requirements, the government must make clear that it has transitioned from the negotiation phase to the direction phase before it may terminate for breach of the duty to proceed. For example, in *Delfour, Inc.*,[388] the contractor had been haggling with the government over the amount of corrective work required in a building modification. The contractor had been successful in limiting the amount of work required and continued to negotiate. The government remained uncertain of what had been agreed and it never gave the contractor an unequivocal directive to proceed on pain of termination. The board ruled that the

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[387]*See* Monitor Plastics Co., ASBCA No. 11187, 67-2 BCA ¶ 6408, where the contractor stopped work during negotiation of a contract modification to correct allegedly defective specifications. The government prepared a draft agreement, inserting a condition that would have forced the contractor to reperform an expensive portion of the contract. The contractor was unable to get an answer to its request to delete the condition; thus, the board held that the contractor was justified in stopping performance. The board ruled that whether the specifications were defective or not, the contractor had no duty to proceed until the negotiations were completed and a decision was issued.

[388]VABCA Nos. 2049 *et al.*, 89-1 BCA ¶ 21,394.

termination was improper stating:

> If the evidence establishes, as it does here, that the parties were engaged in a dialogue, even as in this case, one kept alive by the contractor's reluctance to accept the Government's assessment of the defects, and the Government was aware that meaningful work had ceased pending resolution of the dialogue, then the Government, before it can perfect a default termination on the basis of failure to make progress or failure to follow a direction, has an obligation to affirmatively cut off that dialogue and put the contractor on notice not only that discussions are over, but also that the contractor must proceed or otherwise face the consequences of default.[389]

When the government's directions are incomplete, the contractor is justified in refusing to proceed.[390]

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[389] *Id.* at 107,858.

[390] *See* G.W. Galloway Co., ASBCA No. 17436, 77-2 BCA ¶ 12640 (CO issued modification but failed to resolve major issue of specification clarification; hence, contractor had no duty to proceed); Monitor Plastics Co., note 387 *supra*.

CHAPTER VI

FAILURE TO COMPLY WITH OTHER CONTRACT PROVISIONS

A. Introduction

This chapter examines termination for violation of contract provisions other than failure to deliver or failure to progress. The Supply/Service clause explicitly confers the right to terminate for failure to comply with other provisions of the contract, provided that the contractor is provided notice and an opportunity to cure.[391] The construction clause does not include a similar provision. Professors Nash and Cibinic note that the clause gives the government the "right to terminate prior to delivery date without the necessity of establishing a progress failure."[392] They also point out that the clause has

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[391]FAR 52.249-8 provides in pertinent part:

(a) (1) The Government may, subject to paragraphs (c) and (d) below, by written notice of default to the Contractor, terminate this contract in whole or in part if the Contractor fails to --

* * *

(iii) Perform any of the other provisions of this contract (but see subparagraph (a)(2) below).

(2) The Government's right to terminate this contract under subdivisions (1)(ii) and (1)(iii) above, may be exercised if the Contractor does not cure such failure within 10 days (or more if authorized in writing by the Contracting Officer) after receipt of the notice from the Contracting Officer specifying the failure.

[392]J. Cibinic, Jr. & R. Nash, Jr., Administration of Government Contracts 700 (2d ed. 2d printing 1986).

been used inappropriately to support terminations for failure to perform in compliance with specifications. Such specification defects "should be treated as delivery failures if occurring after the scheduled delivery date or as progress failures if occurring before that time."[393] As noted above, the right to terminate under this proviso is conditioned upon the same ten-day cure period applicable to progress failures. This chapter examines the application of this provision and also discusses terminations based on violations of other provisions which provide an independent right to terminate.

B. The Other Provisions Clause

The application of the "other provisions" clause is no different from the application of the other clauses. The key inquiry is whether the failure is material to the contract. The ASBCA has described the application of this clause in *C-6 Indus., Inc.*:[394]

> In order to sustain a default termination of failure to perform some "other provision" of a contract pursuant to paragraph (a)(ii)[395] of the Default

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[393] *Id.* at 702.

[394] ASBCA No. 35070, 88-2 BCA ¶ 20,544 at 103,876.

[395] The reference to paragraph (a)(ii) corresponds to the 1969 version of the default clause where progress failure was combined with other provisions as well as the cure notice requirement in one paragraph, providing in pertinent part:

> (ii) if the Contractor fails to perform any of the other

> clause, the Government must show that the breach of "other provisions," not pertaining to accomplishment of the contract work itself, constitutes a material breach.

The board, in *dicta* suggested that failure to maintain in-process inspection records, which were critical to evaluation of the safety of the component, was a material breach. However, it overturned the default termination on other grounds. Determination of materiality is a largely factual inquiry; thus, the resolution of these cases is not governed by mathematical precision. Although the cases are relatively scarce, they are instructive.

In *Precision Products*,[396] the board used the same test in declining to find a material breach where the contractor had manufactured first articles in its factory, but subcontracted for manufacture of production items at another factory in violation of a provision requiring production at the same facility. The fact that a government inspector had been aware of the contractor's course of action and had led it to believe that approval of a waiver would be forthcoming militated against a finding of material breach. The board also addressed whether the contractor's false certification that first articles and production items were manufactured at the same facility, was

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> provisions of this contract, or so fails to make progress as to endanger performance....

[396]ASBCA No.25280, 82-2 BCA ¶ 15,981 ("to sustain a default termination, the Government must demonstrate that the breach of other provisions, not pertaining to accomplishment of the contract work itself, constituted a material breach").

material. The board indicated that this misrepresentation would have constituted a material breach; however, it declined to so rule because a government representative had counseled the contractor to lie on the certification.

The GSBCA's application of the "other provisions" clause requires first that the breach in performance pertain to a "significant contractual requirement" and that the noncompliance be substantial.[397] In *American Business Systems*,[398] two contracts covered maintenance and repair of electric and manual typewriters respectively. The contractor was to be paid a flat rate for reconditioning jobs and on a time and materials basis for repair work. It failed to maintain required records and refused to disclose other records to a government auditor. The auditor was, therefore, unable to verify labor and material charges on the contracts. The board found that the breach was material with respect to the electric typewriters because that contract involved substantial charges for time and materials. However, the board also ruled that the breach was not material

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[397]American Business Systems, GSBCA Nos. 5140, 5141, 80-2 BCA ¶ 14,461. The board stated the tests as follows:

> In a case where the alleged non-performance is of some contractual duty other than the contract work itself, we feel it appropriate to apply the converse of the substantial completion rule and ask whether the contractor's non-performance represents a form of substantial *non*-compliance with a significant contractual requirement.

Id. at 71,292.

[398]*Id.*

with respect to the manual typewriters because almost all work thereunder pertained to reconditioning, with minimal billing for time and material work. In the latter ruling the board held that the contract requirement was significant, but that the noncompliance was insubstantial.[399]

The failure to furnish required bonds has justified termination under the other provisions clause.[400] The construction default clause does not contain an "other provisions" clause upon which to base terminations for reasons separate from workmanship performance failures; nonetheless, the boards have ruled that failure to furnish bonds will sustain default terminations.[401]

In addition to the above cases involving failure to furnish bonds, false certification, and failures in recordkeeping, the boards have also ruled on materiality where safety requirements were not observed,[402] where the Buy American Act was not

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[399]*Id.* at 71,293.

[400]Austin Elcon Corp., ASBCA No.26215, 82-1 BCA ¶ 15,718 ("[i]t is also well established that appellant's failure to furnish the required bonds constituted a breach of its contractual obligation that justifies termination of the contract for default pursuant to paragraph (a)(ii) of the 'Default' clause").

[401]Dry Roof Corp., ASBCA No. 29061, 88-3 BCA ¶ 21,096 ("[t]he failure to furnish required performance and payment bonds is a breach of a condition that is sufficient to justify terminating the contract for default"); Quick Deck, Inc., PSBCA No. 1451, 86-2 BCA ¶ 18,986 ("[t]he failure to furnish bonds required by a contract is a failure of performance which will justify a termination for default").

[402]The Four Roses Painting Co., PSBCA No. 1013, 83-1 BCA ¶ 16,541 (painting contractor failed to adequately barricade its work to protect postal workers and failed to have postal machines mechanically "locked out"

followed,[403] where fire regulations were not observed and proper insurance coverage was not obtained,[404] where a required license was not obtained,[405] and where a conflict of interest certification was violated.[406] The cases reveal no litmus test for assertion of the right to terminate. Rather, the issues are resolved on a case-by-case basis applying the general notions of materiality of the breach as discussed in the last chapter.

C. Fraud

The Court of Claims ruled in *Joseph Morton Co. v. United*

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for safety before working in such areas; cumulation of safety observance failures in addition to workmanship defects justified default termination).

[403]*See* Sunox, Inc., ASBCA No. 30025, 85-2 BCA ¶ 18,077 (government initiated default termination cure notice for violation of Buy American Act; however, contractor anticipatorily repudiated before termination issued); *cf.* Modular Devices, Inc., ASBCA No. 33708, 87-2 BCA ¶ 19,798 (board intimated that violation of Buy American and Small Business requirements would sustain default termination; however, it upheld the termination on delivery failure grounds).

[404]Willard E. Clark, ASBCA No. 9667, 1964 BCA ¶ 4190 (default termination justified where in addition to rendering poor workmanship, contractor violated fire regulations and failed to maintain continuous insurance coverage).

[405]Old Dominion Security, Inc., GSBCA No 8563, 88-2 BCA ¶ 20,785 (requirement that contractor provide valid state license prior to performance was significant requirement because guards had to carry firearms in compliance with state law; termination for default sustained for violation of "other provisions" clause).

[406]Continental Shelf Assocs., Inc., GSBCA No. 6958-COM, 83-2 BCA ¶ 16,696 at 83,060 (board in *dicta* noted that "the Government had the right to terminate appellant's contract for default as the result of appellant's violation of its conflict of interest certification," although the government never instituted the termination).

States,[407] that

> A contractor which engages in fraud in its dealings with the government on a contract has committed a material breach justifying a termination of the entire contract for default.

In that case, the court rejected the contractor's argument that its conviction of fraud in one aspect of the contract did not taint the entire contract to the point of justifying the termination. The fraud consisted of submitting false documents relating to a single change order. The Federal Circuit affirmed the termination, noting that the rationale of termination for fraud was "the necessity for the Government to be secure in its confidence in its contractors."[408] Although the court went on to note that "there is support for the argument that any fraud warrants termination for default as a matter of law," it declined to base its decision on that premise, holding only that Morton's fraud was sufficient to warrant termination.[409]

In *Michael C. Avino, Inc.*,[410] where the conviction of a

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[407]3 Cl. Ct. 120, 122 (1983), *aff'd* 757 F.2d 1273 (Fed. Cir. 1984).

[408]Joseph Morton Co. v. United States, 757 F.2d 1273, 1278 (Fed. Cir. 1985). The court also made clear that the government may justify a termination on grounds existing at the time of termination, even if those grounds were not discovered until after the termination had been issued.

[409]*Id.* at 1279. The Federal Circuit had previously held in United States v. Human Resources Mgt., Inc., 745 F.2d 642 (1984), that default termination was justified where the contractor falsely certified the propriety of payments due. The contractor had failed to pay a subcontractor; however, it had billed the government for the amounts due the subcontractor. The court ruled that "[b]y filing such false vouchers, Resources breached" the contract. *Id.* at 646.

[410]ASBCA No. 31752, 89-3 BCA ¶ 22,156.

project manager for falsifying concrete strength test reports was imputed to the contractor, the board ruled that it was "impelled to sustain the default termination" based upon the Claims Court's opinion in *Joseph Morton*. Thus, it appears that the boards will follow the broad holding of the Claims Court's in *Joseph Morton* and find *any fraud* sufficient to warrant termination. This result may lead to onerous consequences where the breach is in fact *de minimis* with respect to the contract as a whole. Nonetheless, the Federal Circuit's seeming approval of the Claims Court's expansive statement would appear to support strict liability for any fraudulent conduct.

D. Other Clauses Conferring the Right to Terminate

(1) The Applicable Clauses

Various contract clauses independently confer the right to terminate for default. For example, the right to terminate may be triggered by violation of the "Gratuities" clause,[411] the "Covenant Against Contingent Fees" clause,[412] the "Remedies for Illegal or Improper Activity" clause,[413] the "Security Requirements" clause,[414] the "Certification Regarding Debarment"

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[411]FAR 52.203-3.

[412]FAR 52.203-5.

[413]FAR 52.203-10.

[414]FAR 52.204-2.

clause,[415] the "Small Business Concern Representation" clause,[416] the "Small Business and Small Disadvantaged Business Subcontracting Plan" clause,[417] the labor standards compliance clauses,[418] the "Equal Opportunity" clause,[419] the "Affirmative Action" clauses,[420] the "Drug-Free Workplace" clause,[421] and the inspection clauses.[422] Professors Nash and Cibinic note that in violations of these types of clauses, the right to terminate may be derived from the clause itself; thus, "there is apparently no need to rely on the provisions of a default clause in order to justify such a termination."[423] Most of these clauses have not been the subject of reported default termination decisions; nonetheless, terminations under several clauses have been litigated and sustained.

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[415]FAR 52.209-5.

[416]FAR 52.219-1.

[417]FAR 52.219-9.

[418]FAR 52.222-12 (Davis-Bacon Act, Contract Work Hours and Safety Standards Act, Copeland Act); FAR 52.222-41 (Service Contract Act); FAR 22.608-6 (Walsh-Healy Act).

[419]FAR 52.222-26.

[420]FAR 52.222-27 (Construction); FAR 52.222-35 (Special Disabled and Vietnam Vets); FAR 52.222-36 (Handicapped Workers).

[421]FAR 52.223-6.

[422]FAR 52.246-2 (fixed price supply); FAR 52.246-3 (cost reimbursement supply); FAR 52.246-4 (fixed price service); FAR 52.246-5 (cost reimbursement service); FAR 52.246-6 (time-and-material and labor hour); FAR 52,246-12 (construction).

[423]J. CIBINIC, JR. & R. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 1276 (2d ed. 2d printing 1986).

(2) Labor Standard Violations

Terminations under the labor standards clauses have been enforced. For example, the boards have upheld terminations for violation of the Service Contract Act,[424] the Walsh-Healy Act,[425] and the Davis-Bacon Act.[426] Cure notices are not required to enforce these termination rights.[427] However, the ASBCA has held that materiality of a labor standard violation is relevant in evaluating a default termination.[428] The VABCA has

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[424]American Photographic Indus., Inc., ASBCA Nos. 29272, 29832, 90-1 BCA ¶ 22,491 (Department of Labor ruling that contractor had violated Act in failing to pay proper wages, sustained termination despite fact that government had terminated on other grounds and had not relied upon labor violations; although contractor had also violated Contract Work Hours and Safety Standards Act, the board did not rely on that violation); Giltron Associates, Inc., ASBCA Nos. 14561, 14589, 70-1 BCA ¶ 8316 (termination for failure to make progress rejected; however, violations of Service Contract Act for failure to pay employees sustained termination).

[425]SanColMar Indus., Inc., ASBCA Nos. 15339 *et al.*, 73-2 BCA ¶ 10,086 (failure to pay required overtime constituted violation of Act; hence, default termination sustained).

[426]Skipper & Co., ASBCA Nos. 30327 *et al.*, 89-1 BCA ¶ 21,490 (late submittal of payrolls in violation of Act sustained default termination); Hellas Painting Contractor, ASBCA No. 31656, 87-1 BCA ¶ 19,427 (failure to pay prevailing wage rate in violation of Act sustained termination); Edgar M. Williams, ASBCA Nos. 16058 *et al.*, 72-2 BCA ¶ 9734 (in sustaining default termination for violation of Act, board held that contracting officer's consideration of violations of Contract Work Hours and Safety Standards Act and Buy American Act was proper).

[427]American Photographic Indus., Inc., ASBCA Nos. 29272, 29832, 90-1 BCA ¶ 22,491 (no cure notice given); Skipper & Co., ASBCA Nos. 30327 *et al.*, 89-1 BCA ¶ 21,490 (board specifically noted that clause "contains no requirement for a 'cure' notice prior to termination" for violation of Davis Bacon Act).

[428]In La Madera Services, ASBCA Nos. 29518 *et al.*, 87-1 BCA ¶ 19,621, the board ruled that the contractor's treatment of workers as subcontractors instead of employees in violation of the Davis-Bacon Act was not a material breach. The contractor had promised to make the required payments and had

also refused to sustain a default termination where the contracting officer failed to provide the contractor with an opportunity to explain or rectify the discrepancy.[429]

(3) Warranty Clauses

Acceptance of work precludes termination for default. The ASBCA has ruled that the default clause "is not applicable to default in post-acceptance obligations."[430] For example, in *ISC-Serco*,[431] the board considered a default termination where the government accepted a building expansion project without noting that the contractor failed to install edge protectors on a loading dock. When the government discovered the missing

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attempted to make the payments prior to the termination. The default termination was, therefore, converted to one for convenience.

[429]In Corban Indus., Inc., VABCA Nos. 2181, 2559T, 88-3 BCA ¶ 20,843, the board refused to sustain a default termination for technical violation of the Davis-Bacon Act, where the violation consisted of a supervisor improperly pocketing payments for another employee unbeknownst to the contractor. The board ruled that the contracting officer's failure to provide the contractor with an opportunity to explain or correct the situation was a failure to exercise discretion. The board also noted that the contracting officer should have considered withholding funds under the clause before resorting to default termination.

[430]Gavco Corp., ASBCA Nos. 29763 *et al.*, 88-3 BCA ¶ 21,095 at 106,502 (default termination set aside; however, contractor not entitled to convenience termination either); *see* W.M. Grace, Inc., ASBCA No. 23076, 80-1 BCA ¶ 14,256 ("[t]he Government cannot ground a default termination upon the quality of performance of services which it has already accepted, regardless of how unsatisfactory the performance of those services may appear in retrospect"); Astubeco, Inc., ASBCA Nos. 8727, 9084, 1963 BCA ¶ 3941 (action under default clause unavailable where contract executed and accepted).

[431]ASBCA No. 36363, 90-1 BCA ¶ 22,262.

protectors less than a year later, the contractor refused to correct the work. The board ruled that once the government "finally accepted the work, the default procedure was a nullity."[432] Thus, the board overturned the default termination, but did not convert it to a termination for convenience.[433] It is relevant to note that the government is entitled to withdraw acceptance for latent defects, fraud, and gross mistakes which amount to fraud; thus, reviving its termination rights under the contract.[434]

Nonetheless, where the contract contains a clause which provides rights that survive acceptance, the default termination will be enforced for violations thereof. For example, in *Cross Aero Corp.*,[435] the board held that the warranty clause, providing the government the right to "demand repayment of the contract price, in whole or in part," included the right to terminate for default; thus, the board ruled that breach of the

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[432]*Id.* at 111,845.

[433]The board also noted that the government had the right to seek damages under the "Inspection and Acceptance" clause which contained a one year warranty.

[434]Cross Aero Corp., ASBCA No. 14801, 71-2 BCA ¶ 9076 (latent defect entitled government to reject items and terminate for default, notwithstanding inspection and acceptance; *see* Sentell Bros., Inc., DOT BCA No. 1824, 89-3 BCA ¶ 21,904 (default termination improper because government failed to show latent defect, fraud or gross mistake amounting to fraud). The Inspection clauses normally include a right to terminate for default in the event of failure to correct rejected work. That right to terminate for default is indistinguishable from the right to terminate for delivery failure because, failure in inspection necessarily means that acceptance has not occurred. Thus, termination under the default clause is not prohibited.

[435]ASBCA No. 14801, 71-2 BCA ¶ 9076.

warranty clause sustained the default termination.[436] In *M-Pax, Inc.*,[437] the board ruled that the warranty clause, providing the right to "otherwise remedy" the contractor's failure to correct work under warranty, entailed the right to terminate for default. Although the board had noted earlier that "a contract may not be terminated for default after performance is completed and final payment is made because there is nothing left to terminate," it ruled that a violation of the warranty clause survived inspection and acceptance and was sufficient to sustain the termination.[438] Thus, the appropriateness of default termination for violation of warranty provisions will turn on the language of the clause.

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[436]The board also based approval of the termination on a latent defect which gave the government the right to reject and terminate.

[437]HUD BCA No. 80-529-C11, 81-2 BCA ¶ 15,410.

[438]*Id.* at 76,344; *cf.* Sentell Bros., Inc., DOT BCA No. 1824, 89-3 BCA ¶ 21,904 at 110,225, where the board, in discussing termination after final acceptance, noted that "where the Government has a right to recover for defective work under another contract provision, termination is an appropriate remedy." There, the inspection clause permitted termination if the contractor refused to correct defective work; however, the board overturned the termination when it found no defective work.

CHAPTER VII

CONCLUSION

The right to terminate for default spans the entire spectrum of the administration of government contracts from the requirement of performance bonds to the enforcement of warranty provisions. The government's power to enforce its rights in the area of delivery failures is fairly expansive. Time is of the essence in government contracts; therefore, a contractor that fails to make timely delivery is in an unenviable position. Nonetheless, the doctrine of substantial compliance limits the government's right to terminate where the defects are minor and easily cured. However, in such situations, the breach will inevitably be minor or else the cure would be too lengthy to impose on the government. Thus, the doctrine is a form of imposing the requirement of materiality on delivery failures.

As illustrated in Chapter Three, the doctrine of substantial completion is often misunderstood; nevertheless, the end results appear to be equitable. The cases fail to recognize that the purpose of the doctrine is to preserve the contract price as the contractor's measure of recovery for work performed. The cases reveal that the boards will allow the contractor to recover under the contract whenever a high percentage of work has been completed, regardless of whether the contract has been substantially completed or not. The

government's rights are protected by allowing it to obtain damages for the uncompleted or defective portion of the work. The reader should be wary of discussions of forfeiture in substantial completion cases. Forfeiture may be a symptom of substantial completion, but it has little to do with the rational application of the doctrine.

The government need not wait until the due date to terminate for default when the contractor's timely completion is questionable. Thus, the key inquiry in progress failures is whether the contractor has exercised due diligence in performance and whether it is reasonably likely to timely complete the contract. Impossibility of timely completion need not be proven; however, the government must bear the burden of showing the reasonableness of its determination that timely completion is threatened.

The duty to proceed during the pendency of disputes requires the contractor to continue performance even when the government erroneously denies claims or changes its requirements. Nonetheless, the contractor may be excused when a) the government fails to make progress payments or otherwise materially breaches the contract, b) the government fails to provide clear direction, or c) performance is impractical.

When the contractor breaches other provisions of the contract such as bond requirements or labor standards, the government may terminate for default, provided that the breach is material. For example, material breaches have been found

where the contractor has committed fraud or violated the Davis-Bacon Act. Not only must the breached provision be important, the breach itself must be significant.

The analysis of the right to terminate for default is not governed by mathematical certainty. An examination of the cases reveals that the courts and boards seek to reach equitable resolutions within the boundaries of discretion. Nonetheless, in certain areas such as the essence of time, the government's right to terminate for default will be strictly enforced. Where the contract language is clear, it will be enforced despite the possible burden on the parties. For example, the Court of Claims has noted:

> [The] default clause...authorized the defendant to terminate all or any part of the contract if a delivery was not made within the time specified. We know of no reasons which would justify overriding the plain language of the contract and denying the defendant a right granted by that language. Absent highly unusual circumstances, the parties to a contract should be able to rely on their contract's express language.[439]

On the other hand, when the contractor experiences some difficulty such as possibly defective specifications, the cases disclose that government conduct must have been above reproach to strictly enforce its rights.

This paper has attempted to provide the reader with an awareness for the various breaches that may trigger the government's right to terminate for default, an appreciation of

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[439]Artisan Electronics Corp. v. United States, 499 F.2d 606, 205 Ct. Cl. 1126 (1974) (commenting on the right to terminate the entire contract for breach of one installment).

the rationale underlying the right, and an understanding of the mechanics of analyzing the appropriateness of the termination.